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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

ZONING BOARD OF ADJUSTMENT FOR THE TOWNSHIP OF WEST AMWELL; HARRY K. RUSH; RAYMOND G. LINDBLAD; CHARLES A. BRITTON; GARY W. BLEACHER; DAVID L. DONDERO; STEWART PALILONIS; ROBERT FULPER, JR.; WERNER J. HOFF; EUGENE J. VENETTONE; BARBARA GILL; JOSEPH HELEWA,

Petitioners,

v.

ALFRED DEBLASIO,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a local land use dispute arising from the denial of a variance application, does a claim lie under section 1983 for violation of Fourteenth Amendment substantive due process rights where: no taking under the Fifth Amendment has been found and no other violation of a fundamental right has been alleged; state law resides ample discretionary decision making authority in local zoning officials; no attempt was made to utilize the detailed and adequate state mechanism for post-deprivation relief prior to initiating federal suit; and, the only protectible interest even alleged is the mere ownership of the underlying property?*

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* The following related questions are raised by the Petition for a Writ of Certiorari recently filed in *Triomphe Investors v. City of Northwood, et al.*, No. 94-1991:

1. What is the appropriate standard of review for federal review of local zoning decisions on substantive due process grounds?

2. Whether it is necessary to establish a state law property or liberty interest as a prerequisite to a substantive due process claim?

PARTIES BELOW

In the court below, in addition to the Petitioners listed in the caption, James and Virginia Lavan were appellees. The Court of Appeals for the Third Circuit affirmed the dismissal of all claims against the Lavans on grounds unrelated to those upon which review is sought in this Court. Accordingly, they are not named as Petitioners herein.

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Petitioners,

v.

ALFRED DEBLASIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Zoning Board of Adjustment for the Township of West Amwell, the volunteer members of the Board who were sued individually for exercising their discretion to reject an application for a variance as well as the Board's attorney and the Township's building inspector (the "ZBA defendants") respectfully petition for a Writ of Certiorari to review that portion of the judgment and opinion of the United States Court of Appeals for the Third Circuit in this case which attempts to define the scope and prerequisites to a substantive due process claim under the Fourteenth Amendment to the United States Constitution.

Hearing mostly silence from this Court and a cacophony from its sister circuits, the court below wrote its own tune and established the following discordant precedent: Any applicant to a local zoning board seeking a beneficial change in status who is disappointed with the results of the established process is now deemed to have a protectible interest sufficient to maintain a substantive due process claim in federal court — merely by virtue of ownership of the underlying property — notwithstanding:

- a failure to demonstrate a Fifth Amendment taking or to allege the violation of another fundamental right;
- a showing of the zoning board members' significant discretion to accept or reject such an application under state law;
- an utter disregard for the adequate and detailed post-deprivation remedies available under state law; and,
- an unsubstantiated allegation of bias on the part of a single zoning board member.

The Third Circuit's opinion directly conflicts with two 1995 decisions of the Sixth and Seventh Circuits (which, in turn, conflict with each other) as well as recent decisions of the Courts of Appeals for the First, Second, Fourth, Fifth, Eighth, Ninth, Tenth and Eleventh Circuits. It also cannot be read consistently with seminal cases and developing trends in the Fourteenth Amendment jurisprudence of this Court. Moreover, the decision of the court below puts the delicate balance of power between federal and state courts out of kilter, threatening a crush of questionable federal court claims.

For these reasons, as more fully discussed below, this Court should review and settle this mature split among the lower courts in order to establish uniformity on this important, recurring federal question and to lock the gate before the stampede begins.

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Appeals for the Third Circuit, dated May 1, 1995, is reported at 53 F.3d 592. It is reprinted in the Appendix hereto, pp. 1a - 33a. The judgment filed therewith is reprinted at 34a - 35a. The opinion and order of the District Court is reported at 820 F. Supp. 876, and reprinted at 36a - 53a. The order denying the Petition for Rehearing and refusing the Suggestion for Rehearing *In Banc* is unreported, and reprinted at 54a - 55a.

JURISDICTIONAL STATEMENT

The jurisdiction of the District Court was invoked, *inter alia,* under 42 U.S.C § 1983 and Section 1 of the Fourteenth Amendment to the Constitution of the United States of America. On May 6, 1993, the District Court granted the ZBA defendants' motion for summary judgment as to, *inter alia,* the substantive due process claim. The Court of Appeals for the Third Circuit, on May 1, 1995, entered a judgment and opinion which, *inter alia,* reversed the District Court's dismissal of the substantive due process claim. On May 30, 1995, the Court of Appeals denied a timely Petition for Rehearing with Suggestion for Rehearing *In Banc* by a vote of 9 - 5. This Petition is being timely filed within 90 days of that denial. The Court of Appeals has issued a stay of the mandate until July 28, 1995 in order to allow Petitioners to seek review by this Court.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) (1988) .

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following provision of the Constitution of the United States:
Amendment XIV, Section 1 provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

This case also involves the following provision of the laws of the United States:

42 U.S.C. § 1983 (1988) provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Since 1974, Respondent, Alfred DeBlasio, has owned a parcel of property in West Amwell Township, New Jersey, upon which sits a modest, pre-fabricated commercial building sometimes referred to as a quonset hut. (4a). Since the mid-1960s, the West Amwell zoning ordinance has designated this parcel R-3, signifying 3-acre minimum residential use. (*Id.*). However, because of an earlier owner's use of the site for a one-man auto body repair business prior to the enactment of this residential designation, at the time of purchase by Respondent the property was exempt from the restriction as a pre-existing nonconforming use. The property's exemption was conditioned upon it being used at the same intensity as an auto body repair shop. (*Id.*). In fact, shortly after acquiring the property, the local Zoning Board of Adjustment (the "ZBA") denied Respondent's application for a variance to use the property for a drywall warehouse business, concluding that "such a business would be detrimental to the welfare of the Township." (38a).

Notwithstanding this ruling, Respondent, without permission from West Amwell, illegally changed the use of the property by leasing it in 1979 to a small battery distribution business run by Peter Holmes. Over the next decade, this small business in a residential zone "grew considerably," increasing its gross output of batteries fifteen-fold, thereby precipitating the filing of a "citizen's complaint" in February 1989 by Virginia Lavan, a neighboring homeowner. (4a, 6a, 38a). It is Mrs. Lavan's simple complaint that initiated the proceedings that have brought the parties to the doorstep of this Court.

Responding to the Lavan complaint, a West Amwell zoning official, Petitioner Eugene Venettone, inspected the site and concluded that the battery business — which was then operating with seven full-time employees, two part-time employees and five tractor-trailer trucks — constituted an illegal expansion of the pre-existing nonconforming use. (6a, 38a). In March of 1990, following the Venettone inspection, Respondent (with the battery business lessee) applied to the ZBA for an interpretation of the status of the property, and, in the event of an unfavorable interpretation, for a variance. (*Id.*).

The ZBA charged by law with ruling on Respondent's March 1990 application was comprised of seven residents of West Amwell, one of whom was Werner Hoff. Approximately two years earlier, Mr. Hoff had had a "brief, unscheduled encounter" (5a) or "unscheduled five minute meeting outside a diner" (41a) with Mr. Holmes, the lessee, during which "Hoff asked Holmes if he was interested in purchasing property which belonged to Hoff's son John as a new location for [the battery business]. Holmes told Hoff that the property was too small for [the battery businesses'] needs and, therefore, he was not interested. Holmes was never contacted again by any person regarding John's property." (5a, 6a, 41a, 42a). Mr. Hoff had loaned his son, John, some money to assist his struggling business and had taken a mortgage on the property in return. (5a, 42a).

Out of an excess of caution, and in deference to New Jersey's strict appearance of impropriety standard, Mr. Hoff recused himself from sitting in judgment of Respondent's March 1990 application. Indeed, Mr. Hoff never believed he was biased or that he could not render a fair and impartial decision; rather, he felt that someone else might possibly think there was an appearance of impropriety. (6a, 43a). Without his participation, the other members of the ZBA identified a technical defect in the citation, and did not consider the merits of Respondent's position until September of 1990, after the issuance of a new citation and the filing of a new notice of appeal and request for a variance, all of which were procedurally proper. (6a, 7a).

During the interim, because his other son, Dr. Werner Hoff, determined to purchase the property, thereby taking him out of the mortgage, Mr. Hoff concluded that even a potential appearance of impropriety could no longer exist. (42a). Accordingly, he participated without objection in the September 1990 appeal and in the subsequent variance proceedings with respect to Respondent's property — which extended into May of 1991. (7a).

In November of 1990, the ZBA adopted a Resolution of Memorialization upholding the zoning official's citation to Respondent for illegally expanding the non-conforming use. (39a). Then, after hearings on the variance, the ZBA in June of 1991 adopted a Resolution of Memorialization denying Respondent's variance application which, if granted, would, in effect, have allowed Respondent to continue the illegally-expanded use in a residential zone. (*Id.*). The ZBA denied the variance because Respondent did not prove that the variance could be granted without substantial detriment to the public good and would not substantially impair the intent and purpose of the zone plan and zoning ordinance. (29a, 39a).

The hearings held before the ZBA concerning the illegal expansion of the nonconforming use and the application for a variance were evidentiary and adversarial. Throughout these proceedings, both Respondent and his lessee were each represented by counsel, and neither objected to the participation of Mr. Hoff. There is no evidence that Mr. Hoff ever displayed any bias against Respondent (or his lessee), or that he improperly attempted to taint the other six ZBA members with any bias he is alleged to have had. (43a, 44a, 45a).

For unknown reasons, Respondent did not avail himself of the clearly defined state court remedy available to all interested persons aggrieved by decisions of local zoning boards of adjustment in New Jersey. Instead, more than six months after his right to state court relief had lapsed, he filed a lawsuit in federal court claiming various violations of the Constitution of the United States, including a violation of his substantive due process rights under Section 1 of the Fourteenth Amendment, and the tortious breach of duties allegedly imposed by state law. The gravamen of the entire federal lawsuit is that the

actions of the ZBA with respect to Respondent's application for a use variance were tainted, and therefore unlawful, because of the participation of Mr. Hoff.

On May 6, 1993, the District Court, after a lengthy and intense discovery period and after considering the submissions and arguments of the parties, granted summary judgment in favor of the ZBA defendants on the substantive due process claim. The District Court found that plaintiff had failed, as a matter of law, to prove that he had such a constitutionally-protected claim which would justify access to the federal courts under section 1983. Plaintiff also raised a number of other federal and supplemental state law claims, but the District Court granted judgment in favor of the ZBA defendants on these as well.

The Third Circuit's May 1, 1995 decision (hereinafter sometimes discussed separately as the "Majority" (Judges Lewis and Mansmann) or the "Dissent" (District Judge McKelvie, sitting by designation)), affirmed the District Court's grant of summary judgment with respect to the section 1983 procedural due process and unlawful taking claims, as well as plaintiff's claims of a section 1985(3) conspiracy and commerce clause violation. However, it reversed the grant of summary judgment for the ZBA defendants on both the substantive due process and state tort claims. The substantive due process claim is the sole issue upon which the ZBA defendants seek review in this Court.

The methodology of the Majority below is instructive as to the need for review by this Court. First, it recognized that "[t]his case raises important questions regarding the extent to which the due process clause of the Fourteenth Amendment may serve to protect landowners against arbitrary governmental regulation of land use." (2a - 3a). It then proceeded to decry "the paucity of Supreme Court guidance" (11a) and what it perceived to be this Court's failure "to clearly define the category of property interests protected by the concept of substantive due process." (14a). Finally, it strode boldly into this self-defined void and staked claim to an unequivocal position that is at odds with the decisions of all the other courts of

appeals (among which there already existed significant discord) and with the meager guidance that has been provided by this Court.

This new rule of law in the Third Circuit — that a plaintiff need only be owner of the underlying property to have a protectible interest sufficient to support a substantive due process claim under the United States Constitution — is termed "unwarranted and unwise" by the Dissent (21a), and will undoubtedly exacerbate the polarization of the lower courts on this important federal question.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's Decision Exacerbates the "Remarkable" Conflict Among the Courts of Appeals on the Question Presented by this Case and Ignores the Guidance Provided by this Court.

Lower courts across the nation have struggled with and disagreed over the standard for judging the threshold property interest required to state a claim for a violation of substantive due process under Section 1 of the Fourteenth Amendment. As aptly summarized by the Court of Appeals for the Sixth Circuit, "[t]he lack of uniformity among the circuits in dealing with zoning cases of the 'arbitrary and capricious' category is remarkable." *Pearson v. City of Grand Blanc,* 961 F.2d 1211, 1217-20 (6th Cir. 1992) (collecting the "conflicting" opinions from all of the circuits, except the Federal Circuit which the Sixth Circuit described as "fortunate in not having to deal with zoning cases"); *Accord RRI Realty Corp. v. Village of Southampton,* 870 F.2d 911, 914-18 (2d Cir. 1989), *cert. denied,* 493 U.S. 893 (1989) (charting the "uneven" course of the courts of appeals in this context).

This Court has done little to establish uniformity. The Majority below (footnote 9, 16a, 17a) seems to invite consideration of this important matter by the Supreme Court: "As we have previously noted, the Supreme Court has yet to articulate a standard for determining which state-created property interests merit substantive due process protection." *Accord Pearson,* 961 F.2d at 1217 (noting that the Supreme

Court "has never laid down definitive standards of review" for those substantive due process claims based on an allegation of "arbitrary and capricious" behavior by local officials).

No better example of the reigning confusion can be found than the convoluted effort by the Third Circuit in this case. The court below ultimately generated a standard unique in its definition and utterly foolhardy in its application. All of the other United States Courts of Appeals have rejected this "mere ownership" standard. While united in their disagreement with the test developed by the Third Circuit, they are deeply divided over what alternative standard to adopt.[1] It is imperative for this Court now to resolve this important dispute.

Many of the courts of appeals, for example, have followed the "legitimate claim of entitlement" standard enunciated by the Supreme Court in *Bd. of Regents v. Roth*, 408 U.S. 564 (1972). *See e.g., RRI Realty*, 870 F.2d 911; *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54 (2d Cir. 1985); *Biser v. Town of Bel Air*, 991 F.2d 100 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 182 (1993); *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63 (4th Cir. 1992); *Triomphe Investors v. City of Northwood*, 49 F.3d 198 (6th Cir. 1995); *Silver v. Franklin Twp. Bd. of Zoning Appeals*, 966 F.2d 1031 (6th Cir. 1992); *Carolan v. City of Kansas City, Mo.*, 813 F.2d 178 (8th Cir. 1987); *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111 (10th Cir. 1991); *Spence v. Zimmerman*, 873 F.2d 256 (11th Cir. 1989).

Other courts of appeals in this context have applied a "fundamental rights" analysis in deciding whether a particular state-imposed deprivation is of constitutional magnitude. *Mid-American Waste Systems, Inc. v. City of Gary, Ind.*, 49 F.3d 286 (7th Cir. 1995), *reh'g and sugg'n for reh'g in banc denied*,

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[1] An attempt has been made to categorize some of the more recent decisions of the courts of appeals on this issue according to the test they have chosen to apply. This attempt is doomed to failure by the multiplicity of tests (and permutations thereof) used by different panels of the same court and even sometimes within the same opinion by a single judge. While a bit facile, this categorization process does serve to highlight some of the jurisprudential options that were available to the Third Circuit and the policy concerns which animate each choice.

(1995). *Mangels v. Pena,* 789 F.2d 836, 839 (10th Cir. 1986) ("Rights of substantive due process are founded not upon state provisions but upon deeply rooted notions of fundamental personal interests derived from the Constitution"); *Regents of the Univ. of Mich. v. Ewing,* 474 U.S. 214, 228-29 (1985) (Powell, J., concurring) (state-created property interest not necessarily "property" for substantive due process purposes because such rights "are created only by the Constitution"). See Craig W. Hillwig, "Giving Property All the Process That's Due: A Fundamental Misunderstanding About Due Process", 41 Cath. U.L. Rev. 703, 710 (1992) (the substantive component of the due process clause protects personal interests created not by the state, but by the Constitution itself).

The remaining circuits — the First, Fifth, Ninth (and sometimes the Seventh) — have demonstrated a pervading skepticism about substantive due process claims in the context of land use regulation by treating nearly all actions by local zoning officials as "legislative" in nature and applying a highly deferential "rational basis" review. *Cloutier v. Town of Epping,* 714 F.2d 1184, 1189 (1st Cir. 1983); *Calhoun v. St. Bernard Parish,* 937 F.2d 172, 174 (5th Cir. 1991), *cert. denied,* 520 U.S. 1060 (1992); *Kawaoka v. City of Arroyo Grande,* 17 F.3d 1227, 1234 (9th Cir. 1994), *cert. denied,* 115 S. Ct. 193 (1994); *Coniston Corp. v. Village of Hoffman Estates,* 844 F.2d 461, 467 (7th Cir. 1988).

Collectively, these decisions offer persuasive authority for rejecting the Third Circuit's singularly misguided approach. For example, the superiority of the *Roth* standard was neatly summarized by the Court of Appeals for the Fourth Circuit:

> We believe that this standard appropriately balances the need for local autonomy in a matter of paramount local concern with recognition of constitutional protection at the very outer margins of municipal behavior. The standard represents a sensitive recognition that decisions on matters of local concern should ordinarily be made by those whom local residents select to represent them in municipal government — not by federal courts. It also recognizes that the Fourteenth Amendment's Due Pro-

> cess Clause does not function as a general overseer of arbitrariness in state and local land-use decisions. In our federal system, that is the province of state courts.

Gardner, 969 F.2d at 69 (citations omitted).

Since *Roth*, most courts searching for a property interest under the Fourteenth Amendment have focused on "what is sought." *RRI Realty Corp. v. Incorporated Village Southhampton,* 870 F.2d at 915. One of these decisions, *RRI Realty,* is particularly instructive. A review of the facts and law of that decision lends further support to an approach to analyzing property interests in the context of the Fourteenth Amendment far different than the one adopted by the Third Circuit in this case.

Factually, the plaintiff in *RRI Realty* presented a compelling scenario for relief: Plaintiff, a developer, purchased a 63-room mansion and surrounding oceanfront property with a plan to do extensive renovations; plaintiff had repeated discussions with the local building inspector, keeping him apprised at all times concerning the proposed design; plaintiff received a limited building permit from this building inspector and, at the official's suggestion, waited until the design was finalized and much of the construction already complete before requesting final approval; even at this stage, the developer's final overall design was approved by an official architectural review board; in addition, the developer had applied for and received required height variances; further, throughout this construction and final application period the local building inspector continued to tell the developer that the final permit was about to be issued; finally, after the project "became a target of community rumor and a controversial matter in Village politics," local officials took various steps to stop or table the project.

Legally, notwithstanding these facts, the Court of Appeals for the Second Circuit found that "[a]s a matter of law, there was no property interest in the permit." *RRI Realty,* 870 F.2d at 919. The Second Circuit reached this result through a *Roth*-style "entitlement" analysis. Because of the discretion left with local officials, the court found that the plaintiff could not demonstrate that " 'absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the appli-

cation would have been granted,' " *RRI Realty,* 870 F.2d at 917, *quoting Yale Auto Parts,* 758 F.2d at 59. Despite the harsh consequences, the Second Circuit warned against using a test more lenient than the *Roth* "entitlement" test:

> If federal courts are not to become zoning boards of appeals (and not to substitute for state courts in their state law review of local land-use regulatory decisions), the entitlement test of *Yale Auto Parts* — 'certainty or a very strong likelihood' of issuance — must be applied with considerable rigor.

RRI Realty, 870 F.2d at 918.

The "mere ownership" standard set out by the court below is inconsistent with *Roth.* While *Roth* requires a particularized inquiry concerning the strength of a plaintiff's entitlement to the specific benefit that has been sought and denied by the government (*e.g.,* the variance application in this case), the lower court here apparently believes it is enough to simply require a plaintiff to demonstrate that he has some general ownership interest in land.

While the ownership of land is obviously a property interest, it is not the *relevant* property interest for purposes of constitutional analysis; denying a permit or a variance is denying an *additional* interest, and it is the landowner's right or lack of right to this which is relevant. The denial of something to which you do not have a right is simply not a deprivation of property. To provide a constitutional cause of action based on a plaintiff's simple landowner status is, therefore, absurd. Taken to its logical conclusion, a landowner dissatisfied with a zoning board's denial of a variance to erect a Ferris wheel on his front lawn could bring a substantive due process claim directly in federal court under the Third Circuit's nonstandard. It is difficult to conceive that this hypothetical landowner has been "deprived" of anything that the Fourteenth Amendment was intended to protect.

In further conflict with *Roth,* the lower court also ignores the broad discretion the ZBA defendants had when considering plaintiff's variance application; *Roth* and its progeny man-

date a discussion of decision maker discretion. *See e.g., Gardner,* 969 F.2d at 69. In considering an application for a use variance, such as the one sought in this case by Respondent, the ZBA defendants possess a high degree of discretion as a matter of New Jersey law. *Bressman v. Gash,* 621 A.2d 476 (N.J. 1993) (local land use agency entitled to broad discretion). *See also Eagle Group v. Zoning Bd. of Adjustment,* 644 A.2d 1115, 1120 (N.J. Super. Ct. App. Div. 1994) (holding that the legislature "has vested discretionary authority in boards of adjustment to grant or deny variance applications). As correctly apprehended by the Dissent (at 29), the ZBA defendants were operating under a "flexible standard" and had been vested with "discretionary authority" by New Jersey's legislature to grant or deny variance applications. Moreover, in considering applications for such use variances under the New Jersey Municipal Land Use Law, N.J.S.A. 40:55D-1, *et seq.,* the ZBA defendants are to consider various *subjective* criteria. N.J.S.A. 40:55D-70(d). Therefore, as a matter of law, Respondent cannot prevail below if the "legitimate claim of entitlement" standard is applied.

Arguably, under the Third Circuit's analysis, even an *approval* of most but not all of a developer's plans could give rise to a section 1983 claim. As correctly summarized by the Dissent, in order to get a federal court jury trial, "a plaintiff need only allege that a decision limiting the use of land he or she owns was 'arbitrarily or irrationally reached.' " (24a).

Therefore, depending on the happenstance of geographic location within our supposedly unified federal judiciary, a plaintiff seeking review of a local zoning board decision on the ground of substantive due process faces dramatically disparate standards regarding the initial protectible interest that must be demonstrated to assert and maintain such a claim; tumult in the circuits over a basic, threshold question such as this will lead inexorably to dramatically disparate litigation results between similarly situated parties. The existence of a constitutional claim should not turn on the fortuity of the federal circuit in which a party happens to be sued.

Perhaps the most compelling proof of this splintering is found in the decisions of the three courts of appeals to have

addressed this issue within the past six months. *Deblasio* (applying "mere ownership" test); *Triomphe* (applying "legitimate entitlement" test); *Mid-American* (applying "fundamental rights" test). These three courts — speaking for the Third, Sixth and Seventh Circuits — all considered the same basic question but reached conflicting results by employing fundamentally inconsistent logic. Such uncertainty is inimical to the federal interest in uniformity.

II. The Third Circuit's Decision is Inconsistent With the Basic Tenets of Federalism and Will Result in an Avalanche of Meritless Substantive Due Process Claims.

Federal courts are, by definition, courts of carefully circumscribed jurisdiction. It is ironic that at a time when federal court judges have been strictly applying doctrines such as mootness, justiciability and standing as methods for regaining control over their dockets, the Third Circuit has taken a measurable step in the opposite direction.

This Court has unanimously and recently reaffirmed federalism's bedrock belief: Federal courts should be reluctant about extending their reach to areas of the law traditionally dominated by the states, especially when state law provides an adequate remedy for any grievance. *National Private Truck Council, Inc. v. Oklahoma Tax Commission,* 1995 WL 360189 (U.S., June 19, 1995) (relying on "the principle of federalism" and the "longstanding federal reluctance to interfere with state taxation," this Court held that section 1983 provided no basis for courts to award injunctive or declaratory relief because Oklahoma law provided an adequate legal remedy).

The instinct of the federal courts to take a "hands-off" approach should be particularly acute in corners of the law that are inherently local. Land use is such a corner. *Edmonds v. Oxford House, Inc.,* 115 S. Ct. 1776, 1785 (1995) (Thomas, Scalia and Kennedy, JJ., dissenting) (collecting cases emphasizing the peculiarly local aspects of land use regulation and calling it "an area traditionally regulated by the States" and "one of the historic powers of the States"). *Accord Gardner,*

969 F.2d at 67 ("Indeed, land-use decisions are a core function of local government. Few other municipal functions have such an important and direct impact on the daily lives of those who live or work in a community").

By contrast, the "mere ownership" standard of the lower court in this case "invites any land owner into federal court to challenge even the most mundane and routine zoning decisions, ignoring the oft-cited admonition that the role of the federal courts 'is not and should not be to sit as a zoning board of appeals.' " (Dissent at 26a), *quoting Village of Belle Terre v. Boraas,* 416 U.S. 1, 8 (Douglas, J., for the majority) (1974) and 13 (Marshall, J., dissenting); *See also* Dissent (21a) ("This standard opens the doors to the federal courts far wider than the Constitution contemplates, and surely will require the federal courts to sit as 'zoning boards of appeals' "); *Accord Yale Auto Parts,* 758 F.2d at 58 ("If that were the case [that every denial of a license or permit were cognizable under section 1983], every allegedly arbitrary denial by a town or city of a local license or permit would become a federal case, swelling our already overburdened federal court system beyond capacity"). *RRI Realty,* 870 F.2d at 918; *Gardner,* 969 F.2d at 69.

The Third Circuit's "mere ownership" standard comes perilously close to being no standard at all. To permit a claim based on a violation of due process to proceed without an established entitlement would, in effect, allow a plaintiff to use "federal court constitutional litigation . . . as a substitute for state court proceedings in which a broader scope of review of the administrative actions might be available, a review not dependent upon an applicant's establishing that it had a property interest for Fourteenth Amendment purposes." *Midnight Sessions, Ltd. v. City of Phila.* 945 F.2d 677, 679 (3d Cir. 1991), *reh'g denied,* (1991), *cert. denied,* 503 U.S. 984 (1992). The Second Circuit has also warned that to allow "an influx of such cases into federal courts would violate principles of federalism, promote forum-shopping, and lead to unnecessary state-federal conflict with respect to governing principles in an area principally of state concern." *Yale Auto Parts,* 758 F.2d at 59.

The opinion below further disrupts the delicate balance between federal and state courts by contravening the *Parratt*

rule. This Court's decision in *Parratt v. Taylor,* 451 U.S. 526 (1980) held that section 1983 cannot be used to state a claim for a violation of procedural due process when: (1) "random and unauthorized" state action makes pre-deprivation due process impossible; and, (2) adequate state post-deprivation due process is available.[2]

A strong argument exists that the *Parratt* doctrine ought to be explicitly extended to bar the federal courthouse doors to those plaintiffs — such as the Respondent in this case — who have alleged substantive due process violations as a method of circumventing the *Parratt* bar to procedural due process violations:

> The *Parratt* rule has been avoided by attaching a substantive rather than procedural label to due process claims (a distinction that if accepted in this context could render *Parratt* a dead letter) and by treating claims on the Due Process Clause as claims based on some other constitutional provision. *See Taylor v. Knapp,* 871 F.2d 803, 807 (CA9 1989) (Sneed, J., concurring). It has been avoided at the other end of the spectrum by construing complaints alleging a substantive injury as attacks on the adequacy of state procedures. *See Zinermon v. Burch,* 494 U.S. 113, 139-151, 110 S.Ct. 975, 990-996, 108 L.Ed.2d 100 (1990) (O'Connor, J., dissenting); *Easter House v. Felder,* 910 F.2d 1387, 1408 (CA7 1990) (Easterbrook, J., concurring). These evasions are unjustified given the clarity of the *Parratt* rule: In the ordinary case where an injury has been caused not by a state law, policy, or procedure, but by a random and unauthorized act that can be remedied by state law, there is no basis for intervention under § 1983,

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[2] The *Parratt* decision was overruled in part by *Daniels v. Williams,* 474 U.S. 327 (1986) (overruling *Parratt* only in so far as it found a deprivation of life, liberty or property predicated on a prison official's negligence). The so-called "*Parratt* rule" upon which reliance is placed herein remains good law.

> at least in a suit based on 'the Due Process Clause of the Fourteenth Amendment *simpliciter.*' 451 U.S. at 536, 101 S.Ct. at 913.

Albright v. Oliver, 114 S.Ct. 807, 819 (Thomas and Kennedy, JJ., concurring) (1994), *reh'g denied,* 114 S. Ct. 1340 (1994).

The concurring opinion of Justices Thomas and Kennedy in *Albright* also suggests that it would be a natural application of the *Parratt* rule to bar a trumped-up state tort or administrative claim such as the one in this case:

> The common sense teaching of *Parratt* is that some questions of property, contract, and tort law are best resolved by state legal systems without resort to the federal courts, even when a state actor is the alleged wrongdoer. As we explained in *Parratt,* the contrary approach "would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under § 1983.... Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.' "

Albright v. Oliver, 114 S.Ct. at 807 (1994) *citing Parratt* and *Paul v. Davis,* 424 U.S. 693 (1975), *reh'g denied,* 425 U.S. 985 (1976).

Some circuits have already held that if a substantive due process claim is based solely on a state-created property right, the plaintiff must also prove the inadequacy of the state law remedy, thus superimposing the *Parratt* rule onto substantive due process. *See Polenz v. Parratt,* 883 F.2d 551, 558-59 (7th Cir. 1989) (where a substantive due process claim is merely based on a state-created property right, plaintiff must either show a separate constitutional violation or the inadequacy of state law remedies); *Accord Kauth v. Hartford Ins. Co. of Ill.,* 852 F.2d 951, 957 (7th Cir. 1988); *Schaper v. City of Huntsville,* 813 F.2d 709, 717-18, *reh'g denied,* 818 F.2d 865 (5th Cir. 1987).

The Third Circuit's "mere ownership" test, therefore, invites a raft of new section 1983 claims by federalizing an area of the law historically viewed as local and by encouraging a disappointed landowner to bypass existing state avenues of redress. The lower court's approach also rewards the litigant who — simply by changing a few phrases in a pleading — is able to dress in substantive due process clothing what is in reality a procedural due process claim.[3]

III. The Third Circuit's Decision Raises Both Important and Difficult Federal Questions As Well As Severe Real World Implications for Local Zoning Boards, Municipalities and Their Volunteers.

The importance of this issue, and the consequences of confusion, can hardly be overstated. Apart from the split among the circuits, the opinion below is independently worthy of review because it will have such outrageous implications for those who, like Petitioners in this case, are called upon to make the difficult local land use judgments throughout the Third Circuit.[4]

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[3] Here, the Third Circuit affirmed the grant of summary judgment by the District Court in favor of Petitioners on Respondent's procedural due process claim, holding that "New Jersey provides a full judicial process for challenging adverse zoning decisions." (10a).

[4] Both the Majority and Dissent agree that defining what property interests warrant protection under the substantive due process clause of the Fourteenth Amendment raises important and difficult questions. The first sentence of the Majority's Opinion states that "[t]his case raises important questions regarding the extent to which the due process clause of the Fourteenth Amendment may serve to protect landowners against arbitrary governmental regulation of land use." (2a - 3a). This is one point that the Dissent concedes: "I agree with the majority that this case raises important questions about what property interests substantive due process will protect . . ." (21a).

The Majority and Dissent further agree that under the best of circumstances the search for the proper constitutional standard to apply in defining a protectible property interest is "complicated" (21a) because "[s]ubstantive due process is an area of the law 'famous for its controversy, and not known for its simplicity' " (Majority at 11a, *quoting Schaper,* 813 F.2d at 716. However, the Dissent observes that "[w]hile I can appreciate the majority's frustration at the perceived lack of guidance in its search for what consti-

As a practical matter, if this Court does not review the decision below, it is difficult to imagine that local zoning boards, at least in the Third Circuit, will be able to continue attracting dedicated and hard working individuals such as the ZBA defendants. Local zoning officials, most of whom are volunteers working tirelessly on behalf of their communities, deserve to know whether or not they will be routinely exposed to the reality of federal court claims and the spectre of attorneys' fees. With an almost non-existent predicate inquiry concerning property interests, and a nearly insurmountable summary judgment standard, potential volunteers residing in the Third Circuit will have every reason to fear that they could become embroiled in federal court litigation which, no matter how frivolous, may grind on for years.

For the municipalities themselves, the need for a standard which recognizes the reality of the local zoning process is imperative. If the decision below is allowed to stand, municipalities in New Jersey, Pennsylvania and Delaware will have to divert tax dollars from more productive pursuits to the payment of lawyers' fees, the establishment of reserve funds and the payment of federal court judgments. Or, perhaps even more disturbing, quick, quiet settlements with disgruntled developers wielding their powerful new weapon will become the order of the day.

The fear of federal court litigation on the part of zoning board members might also be manifested in a less obvious but equally invidious way. As noted by then-New Jersey Superior Court Judge Greenberg in *Anastasio v. Planning Bd. of West Orange,* 507 A.2d 1194 (N.J. Super. Ct. App. Div. 1986), *certif. denied,* 526 A.2d 136 (1986), fear of litigation may subtly

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tutes such a sufficient property interest, the difficulty of the task does not grant us license to set the threshold so low as to eradicate all utility it was intended to possess." (27a).

Finally, both the Majority and Dissent agree that they are not operating under the best of circumstances. None of the parties in the lower court could point with confidence to a holding of this Court definitively supporting its position. Moreover, the divergent and sometimes indiscernible paths chosen by the other courts of appeals serve only to increase the confusion. This state of affairs may explain the 14 month delay between the appellate argument and decision in this case.

encourage board members to vote in favor of applications for development.[5] With over 500 such zoning boards in the State of New Jersey, the cumulative effect of such subtle bias should not be underestimated.

Another disturbing aspect of the opinion below (and the fractiousness among the circuits) is the lack of a predictable standard for summary judgment motions involving substantive due process claims. The federal courts have long recognized the limited role for federal courts in reviewing zoning decisions, and the need to dispose of such disputes, if possible, in a summary fashion utilizing a "very limited" federal review. *See e.g., Pace Resources, Inc. v. Shrewsbury Twp.*, 808 F.2d 1023, 1034-35 (3d Cir. 1987), *cert. denied*, 482 U.S. 906 (1987), *reh'g denied*, 483 U.S. 1040 (1987) (applying a highly deferential approach, an earlier panel of the Third Circuit dismissed a complaint by a property owner for failure to state a substantive due process claim upon which federal relief could be granted). This case, by contrast, is a perfect example of just how little it will now take in the Third Circuit to get to a federal jury on a constitutional claim. The "mere ownership" standard, when combined with the Majority's cramped view of summary judgment, is "tantamount to no standard at all." (Dissent at 26a). The peril to local governments and officials under the Third Circuit's decision is uniquely and forcefully presented in this case and with these Petitioners.

The Majority below (18a - 20a) performed a *de novo* sifting of the record evidence, concluding that "[w]e disagree with the district court." (19a). The Majority was clearly troubled by the decision of one of the zoning board members, Werner Hoff, to voluntarily recuse himself from initial consideration of plaintiff's application (for what he perceived to be the *possible appearance* of impropriety), and then his subsequent decision to consider and vote on the application. (19a). It should be emphasized, because it is mischaracterized by the Majority below, that the record establishes that at all times Mr.

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[5] Interestingly, Judge Greenberg, now sitting on the Court of Appeals for the Third Circuit, voted to grant Petitioners' Suggestion for Rehearing *In Banc*. (55a).

Hoff believed he was capable of rendering a fair and impartial decision. (43a, 49a). Nonetheless, although the District Court carefully analyzed the considerable discovery in this case and concluded that there was no unresolved issue of material fact, and although Mr. Hoff has testified that he believed even the appearance of a conflict had been resolved, the Majority concludes that it does "not understand why he believed this to be so." (19a).

Even if the facts of this dispute were as the Majority below has suggested, Respondent's section 1983 claim would not survive summary judgment if any test other than the Third Circuit's were applied. Under a "legitimate entitlement," "fundamental rights" or "rational basis" standard, Respondent could not reach a jury because of the following: (1) the District Court expressly found no taking under the Fifth Amendment; (2) no other violation of a fundamental right has been alleged; (3) the ZBA defendants had broad discretion to grant or deny the variance sought by Respondent; (4) there was no evidence below that any other member of the seven-person Zoning Board of Adjustment which denied Respondent's application had conspired with Mr. Hoff, thereby rendering irrelevant any bias which Mr. Hoff may have had; and, (5) Respondent, though represented by counsel throughout the proceedings, never objected to Mr. Hoff's participation in the proceedings and did not avail himself of the detailed and adequate state remedies available to him under New Jersey law.

And yet, under the Third Circuit's non-standard, this slenderest of threads, this mere whiff of bias is apparently all that is required for Respondent to get a trial on his section 1983 claim in federal court. This is an ivory-tower approach to a quonset-hut case.[6] Other courts of appeals have recognized

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[6] For some unknown reason, the Majority below seems to have believed that the nature and name of the type of building involved in the underlying variance application had some relevance to its constitutional analysis, going so far as to define the term "quonset hut" according to the Random House College Dictionary (Majority at 4a). The Dissent correctly noted, however, that "the record is devoid of any explanation as to why it is pertinent that the structure on each piece of property is a quonset hut, or why it was crucial that Holmes's business be located in a quonset hut." (22a).

the reality of local land use decision making and the correspondingly limited role for federal courts:

> The formulation and application of land-use policies, therefore, frequently involve heated political battles, which typically pit local residents opposed to development against developers and local merchants supporting it. Further, community input is inescapably an integral element of this system . . . Resolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is simply not the business of the federal courts.

Gardner, 969 F.2d at 67. Given this context, even a neophyte trial lawyer will have little difficulty pleading and maintaining a claim for a violation of substantive due process rights since local zoning decisions are intended to be made by local board members who invariably know, work with or socialize with applicants and objectors.

Only this Court is empowered to overturn a legal standard which transforms run-of-the-mill contacts inherent in the zoning process into the basis for a constitutional claim requiring a jury trial. The implications of inaction are devastating. The conflict among the courts of appeals is direct and ripe for review. Nothing in the record below would make this case a faulty vehicle for transporting the Court's teachings to the hopelessly torn federal judiciary. Now is the time for this Court to address the issues raised by this Petition.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Filed May 1, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5301

ALFRED DEBLASIO,

Appellant,

v.

ZONING BOARD OF ADJUSTMENT FOR THE TOWNSHIP OF WEST AMWELL; HARRY K. RUSH; RAYMOND G. LINDBLAD; CHARLES A. BRITTON; GARY W. BLEACHER; DAVID L. DONDERO; STEWART PALILONIS; ROBERT FULPER, JR.; WERNER J. HOFF; EUGENE J. VENETTONE; BARBARA GILL; JOSEPH HELEWA; JAMES LAVAN; MRS. JAMES LAVAN,

Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

(D.C. Civil No. 92-00926)

ARGUED MARCH 10, 1994

BEFORE: MANSMANN and LEWIS, *Circuit Judges,*
and McKELVIE, *District Judge.**

(Filed May 1, 1995)

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*Honorable Roderick R. McKelvie, United States District Judge for the District of Delaware, sitting by designation.

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OPINION OF THE COURT

LEWIS, *Circuit Judge.*

This case raises important questions regarding the extent to which the due process clause of the Fourteenth Amendment may serve to protect landowners against

arbitrary governmental regulation of land use. We conclude that in the context of land use regulation, a property owner states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached. Here, the plaintiff, Alfred DeBlasio, did so allege; however, the district court determined on summary judgment that he had failed to present sufficient evidence that the governmental decision in question was arbitrary or irrational. We conclude that DeBlasio has presented sufficient evidence to survive summary judgment in connection with his substantive due process claim.

Appellant Alfred DeBlasio brought suit against the Zoning Board of Adjustment for the Township of West Amwell ("ZBA"), its individual members, Eugene Venettone, the Building and Zoning Official for the Township of West Amwell, the ZBA attorney, and James and Virginia Lavan, Alfred DeBlasio's neighbors, claiming violations of 42 U.S.C. §§ 1983 and 1985(3) and the commerce clause, as well as tortious interference with contractual relations and prospective economic advantage under New Jersey common law. This is an appeal from the district court's granting of the defendants' motion for summary judgment. DeBlasio also appeals the district court's denial of his motion for leave to file a second amended complaint, and the district court's affirmance of the order of the magistrate judge prohibiting DeBlasio from questioning the members of the ZBA concerning the mental processes used by each to rule on DeBlasio's variance application.

We will affirm the district court's grant of summary judgment with respect to DeBlasio's section 1983 procedural due process and unlawful taking claims, as well as DeBlasio's claims under section 1985(3) and the commerce clause. We will also affirm the district court's denial of DeBlasio's motion for leave to file a second amended complaint, as well as the district court's affirmance of the magistrate judge's discovery order. Finally, we will affirm the district court's grant of summary judgment in favor of the Lavans. However, we will reverse the district court's grant of summary judgment with respect to DeBlasio's section 1983 substantive due process claim and state law tort claims against the ZBA defendants.

I.

DeBlasio owns property in West Amwell Township, New Jersey, upon which a Quonset hut had been constructed.[1] Previous owners had used the property, and the Quonset hut, as the site of an auto body repair business.

In the mid-1960s West Amwell enacted a zoning ordinance, pursuant to which the future DeBlasio property was designated R-3, which signifies 3-acre minimum residential use. Since the property was, at that time, being used as the site of an auto body repair business, it was not in compliance with the newly-enacted zoning restrictions. Its owners were permitted to continue their auto body repair business, however, because the property received an exemption as a pre-existing nonconforming use, specifically an auto body repair shop.

In 1967 a neighbor filed a complaint with the ZBA challenging the existence of the auto body repair shop, alleging that the pre-existing nonconforming use had been abandoned or unlawfully expanded. The ZBA conducted a hearing and determined that the use had been properly maintained.

DeBlasio purchased the property in 1974. In 1979, he leased the property to Interstate Battery Systems, a small, battery distribution business run by Peter Holmes. Holmes' business grew considerably over the next ten years. By the end of the 1980s, Holmes employed six full-time workers and two part-time workers. The business used five tractor-trailer trucks and distributed 30,000 batteries a year, many more than the 2,000 batteries Holmes distributed in 1979.

To understand the issues this appeal presents, we must add to this background information some additional facts concerning the Secretary of the ZBA, Werner Hoff, and his children.

Werner Hoff's son, John Hoff, also owned property in West Amwell which included a Quonset hut. John Hoff had used this property as the site of an excavation business.

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1. A Quonset hut is a semicylindrical metal shelter with end walls, usually serving as a barracks or storage shed. See The Random House College Dictionary 1086 (Rev. Ed. 1982).

Toward the end of 1988, John Hoff's business was failing. Werner Hoff believed that if John Hoff could secure some additional funds, he would be able to conduct an orderly and profitable liquidation of his assets. Consequently, in early 1989, Werner Hoff and his older son, Werner Hoff, Jr., loaned the younger Hoff a sum of money. In exchange, Werner Hoff and Werner Hoff, Jr. received a mortgage on John Hoff's property. Werner Hoff, Jr.'s investment company, W.E.H. Realty III, paid the monthly maintenance expenses on the property. Werner Hoff, Sr. acted as Werner Hoff, Jr.'s business agent and handled the day to day management tasks associated with the property.

At some point after 1989, Werner Hoff, Jr. decided to purchase John Hoff's property. According to Werner Hoff, Sr.'s affidavit, Werner Hoff, Jr. agreed to assume John Hoff's debts, and to take "de facto control" of the property. Although it is not clear when this "de facto control" occurred, it is clear from the record that the actual sale of the property to Werner Hoff, Jr. took place in December of 1991.

Toward the end of 1988, when John Hoff's business was experiencing financial difficulties, Werner Hoff, Sr. had a brief, unscheduled encounter with Peter Holmes. According to Holmes' affidavit, in the course of this conversation,

> Mr. Hoff told me that I should consider purchasing or renting his property on Route 31 in West Amwell Township. Mr. Hoff stated that he would sell the Route 31 property to me for $300,000 or, if I did not wish to purchase the property, I could rent it from him.
>
> I told him that the Quonset Hut on that property was smaller than the Quonset Hut on the DeBlasio property, and was too small for my vehicles.
>
> In response, Mr. Hoff represented that the zoning on the Route 31 property was such that I could legally park my vehicles outside. He told me that I wouldn't have the problems on the Route 31 property that I was having on the DeBlasio property. This was a clear reference to the complaints that the township officials had been receiving from the Lavans, who lived across Rock Road from the DeBlasio property.

(Appendix at 249-50). Holmes did not pursue Hoff's offer, and Hoff did not discuss the subject with Holmes at any time in the future.

In February of 1989, Virginia Lavan, who owned property near the DeBiasio property, filed a "citizen's complaint" regarding Interstate Battery. Eugene Venettone, the West Amwell Township zoning official, inspected the property and concluded that the Interstate battery operation constituted an expansion of the pre-existing nonconforming use and that the operation was, therefore, in violation of the West Amwell zoning ordinance.

In March, 1990, DeBiasio and Interstate Battery applied to the ZBA for an interpretation of the status of DeBiasio's property. They also requested a variance, in the event the ZBA decided that Holmes could not continue operating his business without one.

In June, 1990, the ZBA took up the DeBiasio/Interstate petition, among other matters. Secretary Hoff attended the meeting and recorded the minutes. However, when the DeBiasio matter came before the ZBA, Mr. Hoff announced that he would not participate in the ZBA's decision. The ZBA proceeded to find that in issuing the February 1989 citation, Venettone had not adequately identified the particular provision of the zoning ordinance that Interstate had purportedly violated. Consequently, the ZBA decided, it could not "make a determination" regarding the violation. (Appendix at 85). DeBiasio and Interstate then withdrew their request for a variance.

In August of 1990, zoning official Venettone issued a new citation to Holmes. The citation listed "Expansion of the pre-existing, non-conforming use . . ." as the zoning violation.[2]

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2. According to DeBiasio, Hoff spoke privately with Venettone some time between June 26 and August 7, 1990, and pressed Venettone to issue the second notice of violation. In his brief, DeBiasio cites to a portion of Venettone's deposition in support of this contention, where Venettone describes a phone conversation he had with Werner Hoff. The testimony reads:

> [Venettone]: I called him on the phone about business, and that's when the Interstate Battery thing was being tossed around in the

DeBlasio and Interstate filed another notice of appeal of Venettone's decision with the ZBA. They also requested that if their appeal were to fail, the ZBA consider their submission as a request for a variance.

The ZBA heard the appeal in September of 1990. Secretary Hoff participated in these proceedings, having determined that there was no longer an appearance of a conflict now that Werner Hoff, Sr.'s son Werner Hoff, Jr. had announced his decision to purchase John Hoff's West Amwell property. The ZBA voted unanimously to uphold Venettone's decision that Holmes' business operations constituted an unlawful expansion of the nonconforming use. The next month, the ZBA adopted a resolution to that effect.

The ZBA did not take up DeBlasio's request for a variance until the following March. After holding hearings, the ZBA voted against granting the request. Hoff participated fully in these hearings and voted against the variance. In June, 1991, the ZBA adopted a resolution of memorialization denying DeBlasio's request for a use variance. Holmes was given six months to relocate.

This lawsuit followed. DeBlasio's complaint set forth four counts: (1) violation of 42 U.S.C. § 1983, based on the deprivation of his Fourteenth Amendment rights to substantive and procedural due process and his Fifth Amendment right not to have his property taken without just compensation; (2) violation of 42 U.S.C. § 1985(3) (the civil rights conspiracy statute); (3) tortious interference with contractual relations and prospective economic advantage,

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papers, and I would, you know, ask him for information about it, you know, only in his capacity as secretary of the board.

Q: Did Mr. Hoff ever push you to issue a notice of violation? When I say "push you," did he ever suggest or recommend to you that you issue a notice of violation to Interstate Battery?

A: Yes, that he thought they were in violation, as did a lot of people.

(Appendix at 180).

under New Jersey common law; and (4) violation of the commerce clause.

The district court granted summary judgment in favor of the defendants. As to DeBlasio's claims under section 1983, the district court held that DeBlasio's allegations of violations of procedural due process, substantive due process and unlawful taking failed to rise to the level of constitutional violations. The district court further concluded that DeBlasio failed to allege that he was part of any protected class which would bring him under the protection of section 1985. With respect to DeBlasio's tort claims under New Jersey common law, the district court held that DeBlasio failed to comply with the notice provision contained in the New Jersey Tort Claims Act. Finally, with regard to DeBlasio's claims under the commerce clause, the district court held that DeBlasio failed to establish any evidence of a burden on interstate commerce.

II.

Subject matter jurisdiction in the district court was predicated on 28 U.S.C. §§ 1331, 1343 and 1367. We have jurisdiction over this appeal under 28 U.S.C. § 1291. Since this is an appeal from a district court's granting of summary judgment, we exercise plenary review. *Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp.*, 812 F.2d 141, 142 (3d Cir. 1987).

III.

We have fully considered the issues raised in connection with the district court's dismissal of DeBlasio's taking of property without just compensation claim, his section 1985(3) claim, his claim under the commerce clause, as well as his claims that the district court erred in affirming the magistrate judge's discovery order and in denying DeBlasio's motion for leave to file an amended complaint. We conclude that these issues lack merit and do not require discussion.

We now address whether the district court properly granted summary judgment in favor of the defendants in

connection with DeBlasio's due process claims. DeBlasio asserts that the defendants' actions violated his Fourteenth Amendment right to both procedural and substantive due process. We will consider each of these contentions in turn.

A. *Procedural Due Process*

Relying on our decisions in *Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988), and *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667 (3d Cir. 1991), the district court concluded that DeBlasio's procedural due process claims failed because New Jersey provides a constitutionally adequate process for challenging wrongful zoning decisions. We agree that our decisions in *Bello* and *Midnight Sessions* defeat DeBlasio's procedural due process claims.

In order to establish a violation of his right to procedural due process, DeBlasio, in addition to proving that a person acting under color of state[3] law deprived him of a protected property interest,[4] must establish that the state procedure for challenging the deprivation does not satisfy the requirements of procedural due process. *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 680 (3d Cir. 1991) (citation omitted). As we observed in *Bello*, a state provides constitutionally adequate procedural due process when it provides reasonable remedies to rectify a legal error by a local administrative body. *Bello*, 840 F.2d at 1128 (citations omitted). In other words, when a state "affords a full judicial mechanism with which to challenge the administrative decision" in question, the state provides

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3. DeBlasio's violation of due process claims do not run afoul of the "person acting under color of state law" requirement. Clearly, in finding the zoning ordinance violation and in denying the application for a variance, the defendants were acting under color of state law.

4. On occasion, we have refrained from conducting inquiry into the question whether the plaintiff was deprived of a protected property interest, and have proceeded directly to evaluate the nature of the process the plaintiff received. *See e.g., Bello*, 840 F.2d at 1127-28. Following our example in *Bello*, among other cases, the district court never explicitly considered whether DeBlasio had a protected property interest before evaluating the sufficiency of the process afforded DeBlasio.

adequate procedural due process, *id.*, whether or not the plaintiff avails him or herself of the provided appeal mechanism. *Midnight Sessions*, 945 F.2d at 682.

In *Bello*, a developer sued the Code Enforcement Officer of Bethel Park, Pennsylvania, as well as the municipal council and the municipality itself, for denying him a building permit. Bello alleged that the Code Enforcement Officer denied him a building permit as a result of pressure from members of the council who were trying to hinder Bello's building project for personal and political motives. We found that sufficient evidence supported Bello's allegations to create a genuine issue with respect to their truth. Thus, for reasons we will discuss at greater length below, we reversed the district court's grant of summary judgment in favor of the defendants on Bello's substantive due process claim. However, as for procedural due process, we stated:

> Pennsylvania affords a full judicial mechanism with which to challenge the administrative decision to deny an application for a building permit. Indeed, the plaintiffs utilized that mechanism and obtained a building permit. While the Pennsylvania courts have ruled that the initial decision to deny the permit was wrong, the plaintiffs have not and cannot show that the decision was made pursuant to a constitutionally defective procedure . . . .
>
> It is the law in this Circuit that a state provides adequate due process when it provides "reasonable remedies to rectify legal error by a local administrative body." Pennsylvania clearly provides such remedies, as this case exemplifies, and therefore plaintiffs have no justifiable [procedural] due process claim.

Bello, 840 F.2d at 1128 (citations omitted).

New Jersey provides a full judicial process for challenging adverse zoning decisions. As the district court noted,

> N.J.S.A. § 40:55D-70 (a) and (b) provide that the ZBA shall have power to hear and decide appeals of the zoning officer's enforcement of a zoning ordinance and hear and decide requests for an interpretation of a

> zoning ordinance. Furthermore, pursuant to subsections (c) and (d) of this statutory section, the ZBA shall have the power to grant a request for a variance or other relief, so long as the variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zone ordinance.
>
> Also, pursuant to N.J.S.A. § 40:55D-72, any interested party affected by any decision of an administrative officer of the municipality based on or made in the enforcement of the zoning ordinances or official map can appeal to the ZBA.
>
> Last, pursuant to Rule 4:69-1, *et seq.* of the New Jersey Court Rules, plaintiff is entitled to a review, a hearing and relief by filing a complaint, before the expiration of 45 days from the time the plaintiff received notice that his or her application was denied, in the Superior Court, Law Division, bearing the designation "In Lieu of Prerogative Writs."

(Appendix 306-07).

DeBlasio has not alleged that this procedure is inadequate, or that it is anything less than the procedure we found constitutionally adequate in *Bello*. We conclude that the procedures for challenging Venettone's citation as well as the ZBA's denial of DeBlasio's variance application are constitutionally sufficient.[5]

B. *Substantive Due Process*

Substantive due process is an area of the law "famous for its controversy, and not known for its simplicity." *Schaper v. City of Huntsville*, 813 F.2d 709, 716 (5th Cir. 1987). Our substantive due process inquiry is rendered even more difficult by the paucity of Supreme Court guidance.

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5. In *Rogin v. Bensalem Tp.*, 616 F.2d 680 (3d Cir. 1980), we upheld Pennsylvania's scheme for challenging zoning ordinances, which scheme provided for a ministerial review of a proposed use by a Zoning Officer, appeal to the Zoning Hearing Board, and appeal of that decision to the Court of Common Pleas. *Rogin*, 616 F.2d at 694-95.

The district court based it dismissal of DeBlasio's substantive due process claim on its conclusion that DeBlasio had failed to offer sufficient evidence to support the allegation that the ZBA had employed unlawful criteria in denying DeBlasio's application for a use variance and in determining that DeBlasio's property was in violation of the West Amwell zoning ordinance. Before addressing the sufficiency of DeBlasio's evidence of improper motive, we must first determine (1) whether a plaintiff such as DeBlasio must, as a predicate to a substantive due process claim, establish possession of a property interest worthy of substantive due process protection; and (2) if so, whether DeBlasio possesses a property interest worthy of protection under substantive due process. *See Ersek v. Township of Springfield, Delaware County*, 822 F. Supp. 218, 220 (E.D. Pa. 1993).

In *Reich v. Beharry*, 883 F.2d 239 (3d Cir. 1989), we observed that the issue of whether and when state-created property interests invoke substantive due process concerns has not been decided by the Supreme Court. *Reich*, 883 F.2d at 243. Without attempting to define the set of state-created property interests protected by the concept of substantive due process, we concluded in *Reich*: "[i]t is apparent . . . that, in this circuit at least, not all property interests worthy of procedural due process protection are protected by the concept of substantive due process." *Id.* at 244.

In *Reich*, the plaintiff was hired by Washington County, Pennsylvania, to investigate and prosecute the Washington County controller. Reich carried out his assignment and then submitted bills for payment to the county. *Id.* at 239. However, to receive payment, Reich first had to secure the controller's approval, which the controller refused to provide. Reich sued the controller, claiming that she had deprived him of property without due process of law in violation of the procedural and substantive components of the Fourteenth Amendment's due process clause. *Id.* at 240. The controller filed a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). The district court granted the controller's motion. *Id.*

We affirmed the district court's dismissal of Reich's complaint. We held that Reich had failed to state a substantive due process claim. We relied on *Ransom v. Marrazzo*, 848 F.2d 398 (3d Cir. 1988), a case in which we held that an entitlement under state law to water and sewer services does not constitute a protectible property interest for purposes of substantive due process. *Id.* at 244. We explained in *Reich*:

> We believe it follows *a fortiori* from the holding in *Ransom* that Reich's complaint fails to state a substantive due process claim. As we have noted, the only interest that Reich had at stake before Beharry was his interest in avoiding delay in the receipt of payment of a bill for professional services rendered. We can think of no basis for according substantive due process protection to this interest while denying it to those who have had their utility service terminated.

Id. at 244-45.

While we refrained in *Reich* from defining the set of property interests protected by the concept of substantive due process, we did suggest that only *fundamental* property interests are worthy of such protection. We stated that:

> [i]n *Mauriello v. U. of Med. & Dentistry of N.J.*, 781 F.2d 46 (3d Cir. 1986), this court acknowledged that what constitutes a property interest in the procedural due process context might not constitute one in that of substantive due process. In *Mauriello*, a student [was] dismissed for academic reasons from a doctoral program . . . .
>
> In discussing the student's substantive due process claim, the *Mauriello* court appeared to approve of Justice Powell's view . . . that, while property rights for procedural due process purposes are created by state law, substantive due process rights are created by the Constitution. The *Mauriello* court also "share[d] Justice Powell's doubt about the existence of . . . a substantive due process right in the circumstances here," noting that the student's claim to continued enrollment in a graduate program bore "'little resemblance to the

> fundamental interests that previously had been viewed as implicitly protected by the Constitution.'"

Reich, 883 F.2d at 244 (*quoting Mauriello*, 781 F.2d at 50) (*quoting Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985) (Powell, J., concurring)).

Though we have yet to clearly define the category of property interests protected by the concept of substantive due process, in *Bello v. Walker* we provided some guidance in the area of land use regulation.

In *Bello*, the plaintiffs obtained municipality approval for a five stage subdivision building plan. After obtaining building permits for the first stage of the plan, and completing the first stage of construction, the municipality's code enforcement officer denied the plaintiffs' application for building permits to allow the plaintiffs to commence construction of the housing units which comprised the fifth stage of the project. The code enforcement officer contended that he denied the plaintiffs' building permit application because the plaintiffs sought to construct the fifth stage of the project before completing phases two through four. *Bello*, 840 F.2d at 1126. The plaintiffs, however, had never agreed to develop the project in the order suggested by the numerical sequence of the stages. *Id.*

The plaintiffs ultimately sought redress in the Court of Common Pleas of Allegheny County, Pennsylvania. After a hearing, the court ordered the municipality to issue the building permits. *Id.* However, prior to obtaining relief in state court, the plaintiffs filed a complaint under 42 U.S.C. § 1983 against the municipality and the individual municipal officials in the United States District Court for the Western District of Pennsylvania. The plaintiffs alleged that a number of the defendant officials had improperly influenced the decision to deny the plaintiffs' building permit application, in violation, *inter alia*, of the plaintiffs' constitutional rights to due process. *Id.* at 1127.

The defendants moved for summary judgment, presenting evidence that the building permit denial had issued solely because the plaintiffs sought to undertake the fifth stage before developing stages two through four. In opposition to the motion, the plaintiffs presented evidence indicating that

certain town council members had personal animosity towards one of the plaintiffs' employees, and that various defendant members of the town council had pressured members of the council to hinder the plaintiffs' building project so long as the plaintiffs employed this particular employee. *Id.* The district court granted the defendants' motion for summary judgment.

We reversed the district court's grant of summary judgment in connection with the plaintiffs' substantive due process claims. We explained in this regard, after canvassing the recent Supreme Court jurisprudence in the area, that "the deliberate and arbitrary abuse of government power violates an individual's right to substantive due process." *Id.* at 1129. We found that the plaintiffs presented evidence from which a fact-finder could reasonably conclude that certain council members "improperly interfered with the process by which the municipality issued building permits, and that they did so for partisan political or personal reasons unrelated to the merits of the application for the permits." *Id.* at 1129.

> These actions can have no relationship to any legitimate governmental objective, and if proven, are sufficient to establish a substantive due process violation actionable under section 1983. While the defendants claim that the building permit was denied because of plaintiffs' failure to build in numerical sequence, thus presenting an arguably rational ground for the denial of the permit, it is the factfinders' role to resolve this factual dispute.

Id. at 1129-30.

In *Bello* we did not discuss whether the plaintiffs possessed a property interest worthy of substantive due process protection.[6] In subsequent cases we have clarified

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6. Similarly, in the cases of *Pace Resources, Inc. v. Shrewsbury Tp.*, 808 F.2d 1023, 1034-36 (3d Cir. 1987), and *Neiderhiser v. Borough of Berwick*, 840 F.2d 213, 217-18 (3d Cir. 1988), in the context of land use regulation, we did not identify a specific property interest at issue worthy of substantive due process before addressing whether the zoning decision in question violated substantive due process.

that to state a substantive due process claim, a plaintiff must have been deprived of a particular quality of property interest. Our most recent restatement of this proposition is found in *Acierno v. Cloutier*, 40 F.3d 597 (3d Cir. 1994).[7] There we stated that when complaining of a violation of substantive due process rights, a plaintiff must prove that the governmental authority "acted to 'infringe [ ] a property interest encompassed by the Fourteenth Amendment.'" *Acierno*, 40 F.3d at 616 (*quoting Midnight Sessions*, 945 F.2d at 679);[8] *accord Taylor Investment v. Upper Darby Township*, 983 F.2d 1285, 1292 (3d Cir. 1993) (stating, in dicta, that to prevail on a substantive due process claim, a plaintiff "must demonstrate that an arbitrary and capricious act deprived them of a protected property interest").

We think it consistent with *Bello* to conclude that ownership is a property interest worthy of substantive due process protection.[9] *See, e.g., Ersek v. Township of*

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7. Though one issue in *Acierno* was considered by the court sitting *in banc*, the substantive due process issue was considered by the panel only. *Acierno*, 40 F.3d at 600.

8. We further explained in *Acierno*:

> As the Supreme Court has previously stated: Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).
>
> Thus . . . when analyzing substantive due process claims courts are required to turn to state and local law to determine whether the plaintiff possessed a property interest which was abrogated by the governmental action.

Id. at 616.

9. The dissent does not read *Bello* as "standing for the proposition that mere ownership is a sufficient substantive due process property interest." Dis. Op. Typescript at 24. Instead, the dissent would hold that "legitimate claim[s] of entitlement" determine the set of property interests worthy of substantive due process. Our understanding of *Bello*'s impact upon this case leads us to a different conclusion.

Springfield, Delaware County, 822 F. Supp. 218, 221 n.3 (E.D. Pa. 1993) (offering a similar interpretation of *Bello*). Indeed, one would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership. Thus, in the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached.[10] Where the plaintiff so alleges, the plaintiff has, as a matter of law, impliedly established possession of a property interest worthy of substantive due process protection.[11]

First, we note that in *Bello*, we did not undertake an entitlement analysis before finding that the plaintiffs asserted substantive due process claim survived summary judgment. *See Bello v. Walker*, 840 F.2d 1124, 1128-1130. Second, we are less certain that the "legitimate claim of entitlement" approach is mandated by Supreme Court jurisprudence. As we have previously noted, the Supreme Court has yet to articulate a standard for determining which state-created property interests merit substantive due process protection. *See Reich v. Beharry*, 883 F.2d 239, 243 (3d Cir. 1989). As for *Board of Regents v. Roth*, 408 U.S. 564 (1972), a decision the dissent relies upon, we agree with the observation of the Court of Appeals for the Second Circuit: in *Roth*, the Court announced that a property interest within the meaning of the Fourteenth Amendment "*includes not only what is owned* but also, in some limited circumstances, what is sought." *RRI Realty Corp. v. Inc. Village of Southampton*, 870 F.2d 911, 915 (2d Cir. 1989) (emphasis supplied) (*citing Roth*, 408 U.S. at 577).

10. In *Neiderhiser v. Borough of Berwick*, 840 F.2d 213 (3d Cir. 1988), we held that a lessor who had been denied an exemption from a zoning ordinance stated a substantive due process claim by alleging that the exemption application was arbitrarily and irrationally denied. *See Neiderhiser*, 849 F.2d at 218 (*citing Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988). Having implied in *Neiderhiser* that a lessor possesses a property interest worthy of substantive due process protection against arbitrary and irrational governmental deprivation, an actual property owner, *a fortiori*, possesses such an interest.

11. We do not share the dissent's legitimate concern that this standard "will invite land owner into any federal court to challenge even the most

C. *Sufficiency of Evidence of Substantive Due Process Violation*

We now turn our attention to the question of the sufficiency of DeBlasio's evidence of improper motive.

As explained above, in *Bello*, we reversed the district court's grant of summary judgment, concluding that the plaintiffs had presented evidence from which a fact-finder could reasonably conclude that certain council members, for partisan political or personal reasons, improperly interfered with the process by which the municipality issued building permits. *Bello*, 840 F.2d at 1129-130. DeBlasio has made allegations that, if proven, would establish a similar violation of his right to be free from arbitrary and capricious government action affecting his interest in use and enjoyment of property. The question is whether DeBlasio has come forward with enough evidence in support of those allegations to survive a motion for summary judgment.

The district court did not think so. The court downplayed the significance of Werner Hoff, Sr.'s 1988 unscheduled encounter with Holmes, stating:

> The only possible "illegal conduct" which plaintiff might be referring to appears in Holmes's affidavit and recites that Hoff participated in the hearings in light of the five-minute conversation which took place between the two individuals. This evidence is not sufficient to enable a jury to establish bias, bad faith, improper

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mundane and routine zoning decisions[.]" Dis. Op. Typescript at 26. The standard we articulate today is implicit in *Bello*, and *Bello* has not overburdened the federal courts by inviting meritless landowner suits. Moreover, we note by way of analogy that persons denied licenses required for the practice of certain occupations are not required to demonstrate entitlement to the license sought in order to state a substantive due process claim. To state a substantive due process claim, such persons need only assert that the license sought was arbitrarily denied. *See RRI Realty Corp.*, 870 F.2d at 917-18 n.4 (*citing Wilkerson v. Johnson*, 699 F.2d 325 (6th Cir. 1983)). This rule has not invited abuse of the federal courts by persons denied licenses to pursue particular occupations.

> motive, racial animus, or the existence of partisan political or personal reasons and, therefore, to return a verdict in plaintiff's favor.

(Appendix at 309).

We disagree with the district court. We conclude that a genuine issue of material fact must be resolved to determine whether or not Werner Hoff, for personal reasons, improperly interfered with the process by which the Township of Amwell rendered zoning decisions, and that summary judgment should not have been entered in favor of the defendants. Werner Hoff had decided to abstain from participating in the ZBA hearings in May or June of 1990. By September, however, he believed that his apparent conflict had been resolved. We do not understand why he believed this to be so. One of his sons still owned the West Amwell property, and the property remained unoccupied. In fact, Werner Hoff, Sr. continued to hold a mortgage on it. On the other hand, and contrary to DeBlasio's assertions, the record does not show that Hoff ever "pressured" Holmes to abandon the DeBlasio property in favor of his own. Still, Werner Hoff did state, both to Holmes and later to Venettone, that he believed his family's property would be a good place for Holmes' business. In addition, in his conversation with Holmes, Hoff specifically mentioned that one advantage of the Hoff property was its more favorable zoning status.

Hoff never approached Holmes after 1988, and the ZBA hearings did not begin until May of 1991. Additionally, even if Holmes were forced to leave the DeBlasio property, he never indicated that he would want to relocate on Hoff's land. To the contrary, in his conversation with Hoff, Holmes stated that he was not interested in the Hoff property, because the Quonset hut was not large enough to suit his needs. We conclude, nonetheless, that a genuine issue of material fact exists as to whether the ZBA's decisions were, in some part, influenced by Werner Hoff, Sr.'s personal, financial interest in the resolution of DeBlasio's zoning problems. Under *Bello*, DeBlasio thus presented sufficient evidence to withstand the defendants' motion for summary

judgment in relation to DeBlasio's substantive due process claim.[12]

IV.

For the reasons stated above, we will reverse the district court's grant of summary judgment in relation to DeBlasio's substantive due process claim and New Jersey tort claims against the ZBA defendants and remand for proceedings consistent with this opinion. We will affirm the district court's dismissal of DeBlasio's procedural due process claim, claim for taking of property without just compensation, section 1985(3) claim, commerce clause claim, and state tort claims against the Lavans. We will also affirm the district court's denial of DeBlasio's motion for leave to file an amended complaint, as well as the district court's affirmance of the magistrate judge's discovery order.

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12. In Count III of his complaint, DeBlasio stated claims under New Jersey tort law for intentional interference with contractual relations and economic opportunity. The district court granted summary judgment on those claims in favor of the ZBA defendants because DeBlasio failed to comply with the notice provisions of the New Jersey Tort Claims Act ("NJTCA"). Because DeBlasio has asserted intentional tort claims, the notice provisions of the NJTCA do not apply and it was error for the district court to apply them. *See Fuchilla v. Layman*, 210 N.J.Super. 574 (N.J.Super. A.D. 1986).

Although it offered no explanation for having done so, the district court also appears to have granted summary judgment in favor of the Lavans in relation to DeBlasio's tort claim against them. We will affirm the district court's grant of summary judgment in favor of the Lavans as there is no evidence to support DeBlasio's tort claim against them.

McKELVIE, District Judge (sitting by designation), dissenting.

I agree with the majority that this court should affirm the district court's grant of summary judgment in favor of the defendants with respect to DeBlasio's 42 U.S.C. § 1983 procedural due process claim, unlawful taking claim, § 1985(3) claim, commerce clause claim, and state tort claims against the Lavans. I further agree that we should reverse the grant of summary judgment in favor of the ZBA defendants with respect to the New Jersey tort claims. However, because I believe this court should affirm the grant of summary judgment as to DeBlasio's substantive due process claim, I must dissent from parts III.B & C of the majority's opinion.

I. *Introduction and Factual Background*

DeBlasio claims the ZBA defendants violated his rights to substantive due process in determining that his property was not in compliance with the West Amwell zoning ordinances and in denying his application for a use variance. I agree with the majority that this case raises important questions about what property interests substantive due process will protect and that searching for the proper standard is a complicated matter. The majority correctly determines that in order to establish a violation of substantive due process, a plaintiff such as DeBlasio must demonstrate that he possesses a property interest worthy of substantive due process protection. However, I believe the majority's next conclusion, that a plaintiff need only be a property owner to raise a substantive due process violation, is unwarranted and unwise. This standard opens the doors to the federal courts far wider than the Constitution contemplates, and surely will require the federal courts to sit as "zoning boards of appeals." *See RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 918 (2d Cir. 1989). Furthermore, even under the majority's definition of what constitutes a sufficient property interest, I believe DeBlasio has failed to demonstrate the existence of a genuine issue of material fact and thus, the district court's grant of summary judgment must be affirmed.

The facts of this case are simple and straightforward. Indeed, the parties do not disagree as to the following central facts. This case begins with the only two quonset huts existing in West Amwell Township, each located on a different piece of property. Plaintiff is the owner of one of these pieces of property, which he began renting in 1979 to Peter Holmes for his lead acid battery distribution business.[1] The other parcel of land is owned by the son of defendant Werner Hoff, a member of the ZBA. On February 8, 1989, Zoning Officer Venettone issued a first notice to DeBlasio that his property was in violation of West Amwell zoning ordinances. At around the same time, Hoff encountered Holmes in a diner and suggested that Holmes consider renting Hoff's son's quonset hut property. Holmes told Hoff that he was not interested because the hut was too small for his use. On June 26, 1990, the ZBA conducted a hearing on DeBlasio's first notice of violation, and decided that since Venettone's letter to DeBlasio failed to specifically identify the zoning ordinance violated, it was therefore inappropriate to make a determination on the violation. Some time after this hearing, Venettone called Hoff concerning zoning business, at which time they discussed the DeBlasio matter and Hoff gave Venettone his opinion that DeBlasio's property was in violation of the zoning laws. On August 7, 1990, Venettone issued a second notice of violation to DeBlasio, stating that his use of the property was an expansion of a pre-existing, nonconforming use exception to the zoning ordinances. DeBlasio appealed the decision and applied for a use variance. On October 23, 1990, the ZBA voted to uphold Venettone's determination of noncompliance. In addition, on May 28, 1991, the ZBA adopted a motion to deny DeBlasio's application for a variance, and on June 25, 1991, they adopted a resolution memorializing that decision.

Thus, the parties are not in dispute as to the events that occurred leading up to the ZBA's determination that DeBlasio's property was in violation of West Amwell's

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1. I would note that the record is devoid of any explanation as to why it is pertinent that the structure on each piece of property is a quonset hut, or why it was crucial that Holmes's business be located in a quonset hut.

zoning ordinances and its decision to deny DeBlasio a use variance. The only dispute, therefore, is as to what inferences may reasonably be drawn from those facts. The district court determined that, after the close of lengthy discovery, DeBlasio failed to offer evidence sufficient to allow a reasonable jury to draw the inference that the ZBA's zoning decisions were based on bias, improper motive, or some other unlawful criteria. As such, the case was ripe for the grant of a summary judgment. However, the majority disagrees, concluding that "a genuine issue of material fact must be resolved to determine whether or not Werner Hoff, for personal reasons, improperly interfered with the process by which the Township of Amwell rendered zoning decisions." Slip op. at 19.

II. *DeBlasio's Property Interest*

The majority correctly begins its analysis with the property interest DeBlasio must possess in order to make out a claim under substantive due process, and focuses on *Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988). In *Bello*, we did not discuss whether the plaintiffs possessed a requisite property interest; however, we examined the district court's grant of summary judgment assuming that plaintiffs had a sufficient property interest in obtaining a municipal building permit. Thus, the majority notes that one can read *Bello* as requiring a plaintiff to possess "a particular quality of property interest" before he or she may bring a claim for a substantive due process violation. This court recently reaffirmed this position in *Acierno*, holding that a plaintiff "complaining of a violation of substantive due process rights . . . must prove that the governmental authority acted to 'infringe[ ] a property interest encompassed by the Fourteenth Amendment.'" *Acierno v. Cloutier*, 40 F.3d 597, 616 (3d Cir. 1994) (quoting *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 679 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1668 (1992)); *see also Reich v. Beharry*, 883 F.2d 239, 245 (3d Cir. 1989) (finding plaintiff "possesses no property interest that entitles him to substantive due process protection").

The majority falters, however, when it turns to the determination of exactly what property interests will qualify for substantive due process protection. The majority finds

"it consistent with *Bello*" to hold that mere ownership is "a property interest worthy of substantive due process protection." Slip op. at 16. Thus, in order to establish a violation of substantive due process, a plaintiff need only allege that a decision limiting the use of land he or she owns was "arbitrarily or irrationally reached." I believe this rule of law is incorrect for two reasons.

First, I believe that the majority's standard represents a departure from the legal precedent of the Supreme Court and of this Circuit. The majority relies on *Bello* and *Neiderhiser v. Borough of Berwick*, 840 F.2d 213 (3d Cir. 1988), to support its conclusions. However, I do not read *Bello* to stand for the proposition that mere ownership is a sufficient substantive due process property interest. As stated above, the property interest at issue in *Bello* was the apparent right to a municipal building permit. Similarly, *Neiderhiser* does not support such a broad standard. In *Neiderhiser*, as in *Bello*, we skipped the necessary determination of what property interest plaintiffs possessed. However, in that case, the plaintiffs were lessors who asserted a right to a special zoning exemption "based on the fact that the property had been operated on a commercial basis for the past 30 years and that the proposed use was consistent with prior non-conforming . . . use." *Neiderhiser*, 840 F.2d at 214. Thus, it was this interest in the right to a zoning exemption which we assumed was sufficient to allege a viable due process violation.

To answer the question of what "particular qualities" of property interests are protected by substantive due process, I believe our analysis is dictated by our recent decision in *Acierno*, which follows the Supreme Court's teachings in *Board of Regents v. Roth*, 408 U.S. 564 (1972). In *Acierno*, we adopted the Court's position that property interests are not created by the Constitution, but instead "stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Acierno*, 40 F.3d at 616 (quoting *Roth*, 408 U.S. at 577). In so doing, we held that "when analyzing substantive due process claims courts are required to turn to state and local law to

determine whether the plaintiff possessed a property interest which was abrogated by the governmental action." *Id.*

In *Roth*, the Supreme Court focused its definition of a property interest under the Fourteenth Amendment on "what is sought." *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 915 (2d Cir. 1989). In its test, the Court rejected the supposition that a property interest in a certain benefit could stem from a mere "abstract need or desire for it" or "unilateral expectation of it." Instead, there must be a "legitimate claim of entitlement." *Roth*, 408 U.S. at 576; *accord RRI*, 870 F.2d at 915. As we recognized in *Acierno*, this claim of entitlement must be found in state law.

In footnote 9 of its opinion, the majority displays its uncertainty that *Roth*'s "legitimate claim of entitlement approach" is mandated by the Supreme Court, restating its belief that the Court has "yet to articulate a standard for determining which state-created property interests merit substantive due process protection." Slip op. at 17. Whether or not the *Roth* approach is required by the Supreme Court, it would appear that this court has already indicated its approval of the "claim of entitlement" standard by holding in *Acierno* that property interests are created by "rules and understandings that secure certain benefits and support *claims of entitlement* to those benefits." *Acierno*, 40 F.3d at 616 (emphasis added).

In addition, the "claim of entitlement" standard should be applied in this case not only because it follows from the Supreme Court's and Third Circuit's prior jurisprudence, but also because it represents the approach to substantive due process zoning cases adopted by many other circuits as well. *See Gardner v. Baltimore Mayor and City Council*, 969 F.2d 63, 68 (4th Cir. 1992) (holding that existence of a property interest turns on whether there is a "legitimate claim of entitlement" under state law); *Spence v. Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989) (same); *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 917 (2d Cir. 1989) (same); *Carolan v. City of Kansas City*, 813 F.2d 178, 181 (8th Cir. 1987) (same); *Yale*

Auto Parts, Inc. v. Johnson, 758 F.2d 54, 58-59 (2d Cir. 1985) (same).

Second, and perhaps equally as important, I believe the majority's new standard of "mere ownership" is erroneous because essentially it is tantamount to no standard at all. It is difficult to imagine that a plaintiff would argue his or her substantive due process rights had been violated as to property he or she did not even own (or at least possess a significant financial interest in). The majority's conclusion establishes a precedent whereby a plaintiff states a substantive due process claim merely by alleging deliberate and arbitrary abuse of government power. It invites any land owner into federal court to challenge even the most mundane and routine zoning decisions, ignoring the oft-cited admonition that the role of the federal courts "is not and should not be to sit as a zoning board of appeals." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshal, J., dissenting). As Judge Posner wrote for the Seventh Circuit: "[I]t is tempting to view every zoning decision that is adverse to the landowner . . . as a deprivation of property. . . . [However, n]o one thinks substantive due process should be interpreted so broadly as to protect landowners against erroneous zoning decisions." *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 465-66 (7th Cir. 1988).

I believe the majority misunderstands the concern I have articulated above when it states in footnote 11 that "*Bello* has not over-burdened the federal courts by inviting meritless landowner suits." Slip op. at 18. My objection to the challenges to routine zoning decisions that could be brought, under the majority's standard, by anyone who owns land is not that the courts will now be flooded by claims that are meritless per se. It is, rather, that claims brought under this standard do not raise the issues of constitutional significance appropriately addressed by the federal courts. As the First Circuit has consistently held, "the due process clause may not ordinarily be used to involve federal courts in the rights and wrongs of local planning disputes. In the vast majority of instances, local and state agencies and courts are closer to the situation and better equipped to provide relief." *Nestor Colon Medina*

& Sucesores, Inc. v. Custodio, 964 F.2d 32, 45 (1st Cir. 1992). Every zoning decision seemingly "impinges upon a landowner's use and enjoyment of property." *See* slip. op. at 17. Thus, confining the category of property interests a plaintiff must possess simply to ownership subjects every zoning decision to potential federal review.

I believe, as Judge Posner wrote in *Coniston*, "[p]roperty is not a thing, but a bundle of rights." 844 F.2d at 465. Hence, we must look to what particular rights and uses a person is entitled by the state through the ownership of a parcel of land in order to determine whether he or she possesses a property interest that merits due process protection. While I can appreciate the majority's frustration at the perceived lack of guidance in its search for what constitutes such a sufficient property interest, the difficulty of the task does not grant us license to set the threshold so low as to eradicate all utility it was intended to possess.

With that preface, I now turn to the evaluation of DeBlasio's claims. DeBlasio alleges his substantive due process rights were violated by two actions of the ZBA—the affirmance of Venettone's determination that DeBlasio's property was not in compliance with a previously granted exception to the West Amwell zoning code and the denial of DeBlasio's application for a use variance. The first step in analyzing DeBlasio's claims is to determine whether he possesses a property interest that is cognizable under the Fourteenth Amendment. *See Gardner*, 969 F.2d at 68. In order to make this determination, we must look to what "claims of entitlement" can be found in state law.

DeBlasio's claims raise two possible property interests: his right to the continued nonconforming use of his property and his right to obtain a use variance. As to the first, the question of whether a claim of entitlement exists "should depend on whether, absent the alleged denial of due process, there is either a certainty or a very strong likelihood" that DeBlasio's property would have been found to comply with the pre-existing, nonconforming use exception granted to the first owner. *See Yale Auto Parts*, 758 F.2d at 59. It is true that under the New Jersey Municipal Land Use Act, "[a]ny nonconforming use or structure existing at the time of the passage of an

ordinance may be continued." N.J. Stat. Ann. § 40:55D-68 (1991). However, the New Jersey Supreme Court has recognized the general policy in the law to restrict and disfavor a nonconforming use: "Because nonconforming uses are inconsistent with the objectives of uniform zoning, the courts have required that consistent with the property rights of those affected and with substantial justice, they should be reduced to conformity as quickly as is compatible with justice." *Town of Belleville v. Parrillo's, Inc.*, 416 A.2d 388, 391 (N.J. 1980). Thus, an existing nonconforming use may not be enlarged or changed as of right and will be allowed to persist only "if it is a continuance of substantially the same kind of use as that to which the premises were devoted at the time of the passage of the zoning ordinance." *Id.* Furthermore, "[w]here there is doubt as to the substantiality of the extension, it should be disapproved." *Hartman v. Township of Randolph*, 155 A.2d 554, 558 (N.J. Super. Ct. App. Div. 1959).

The previous owners of DeBlasio's property were operating a one-man automobile repair shop when West Amwell adopted its first zoning ordinance, and it was this use that was permitted to continue as a pre-existing nonconforming exception to the zoning restrictions. Holmes's interstate battery distributorship clearly represents a departure from this prior use, and there would appear to be some doubt as to whether this battery business is "substantially the same kind of use" as the previous single person car repair shop. Thus it cannot be said that there is a "certainty or a very strong likelihood" that DeBlasio would have been permitted to continue the present use of his property indefinitely, and that he would never have been deemed to have expanded the pre-existing nonconforming use exception granted to the prior owners. Consequently, DeBlasio possesses no claim of entitlement under state law to the continued nonconforming use of his property, and thus does not possess this first category of property interest which he asserts.

As to the second possible property interest, that is, whether DeBlasio had a right to approval of his application for a use variance, many courts have held that "whether a property-holder possesses a legitimate claim of entitlement

to a permit or approval turns on whether, under state and municipal law, the local agency lacks *all* discretion to deny issuance of the permit or approval. Any significant discretion conferred upon the local agency defeats the claim of a property interest." *Gardner*, 969 F.2d at 68; *accord New Burnham Prairie Homes v. Village of Burnham*, 910 F.2d 1474, 1480 (7th Cir. 1990); *Spence*, 873 F.2d at 258; *RRI*, 870 F.2d at 918; *Carolan*, 813 F.2d at 181; *Michigan Environmental Resources Associates, Inc. v. City of Macomb*, 669 F. Supp. 158, 160 (E.D. Mich. 1987). Thus, a cognizable property interest exists "only when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured." *RRI*, 870 F.2d at 918. This standard "balances the need for local autonomy in a matter of paramount local concern" (such as zoning regulations) with the need for constitutional protection from governmental abuses of power. *See Gardner*, 969 F.2d at 69.

New Jersey zoning law authorizes a zoning board of adjustment to grant a variance in "particular cases and for special reasons" to permit "(1) a use or principal structure in a district restricted against such use or principal structure, [or] (2) an expansion of a nonconforming use." N.J. Stat. Ann. § 40:55D-70(d). However, no variance may be granted unless it can be done "without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance." *Id.* These provisions include no mandatory language but instead appear to create a flexible standard which assigns boards of adjustment the power to grant a variance in special cases at their discretion. Moreover, the New Jersey courts have recognized that the legislature "has vested discretionary authority in boards of adjustment to grant or deny variance applications." *Eagle Group v. Zoning Bd. of Adjustment*, 644 A.2d 1115, 1120 (N.J. Super. Ct. App. Div. 1994). It follows, then, that state law has given DeBlasio no claim of entitlement to a use variance, and thus no property interest in the approval of his application.

Therefore, since DeBlasio has failed to demonstrate he possesses any property interests cognizable under the

Fourteenth Amendment that could have been abrogated by the ZBA, the district court was correct in granting summary judgment in favor of the defendants on this issue, and I believe this court should affirm that decision.

III. *Evidence of Personal Bias or Improper Motive*

After determining that "a land-owning plaintiff" who alleges that any governmental decision affecting the use of his or her land was arbitrarily or irrationally reached has, "as a matter of law, impliedly established possession of a property interest worthy of substantive due process protection," the majority goes on to examine "whether DeBlasio has come forward with enough evidence in support of [his] allegations to survive a motion for summary judgment." Slip op. at 17-20. Even if I were to adopt the majority's position that mere ownership constitutes a property interest sufficient to invoke constitutional protection, I do not agree with the majority's conclusion that DeBlasio has presented sufficient evidence from which a fact-finder could reasonably conclude that the government action was taken based on improper motives or unlawful criteria.

The Supreme Court has stated, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A genuine issue of material fact arises only if a reasonable jury could find for the nonmoving party on that fact. *Id.* at 248. The nonmovant is not given the benefit of every inference or possibility, but only of every reasonable inference. *Spence*, 873 F.2d at 257. The nonmoving party must offer sufficient evidence such that a reasonable jury could return a verdict in favor of that party. *Anderson*, 477 U.S. at 248. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 250-51 (citations omitted).

After convincing the court he possesses a cognizable property interest, DeBlasio must demonstrate he was the victim of arbitrary and capricious government action in

order to establish that his substantive due process rights were violated. The district court correctly recognized that this determination turns on whether the actions taken by the ZBA against DeBlasio were based on unlawful criteria such as personal bias, bad faith, or improper motive.

To support his allegations of personal bias and improper motive, DeBlasio appears to allege the following facts: 1) At some point in early 1989, Hoff encountered Holmes in a diner and suggested that Holmes consider renting Hoff's son's quonset hut property. During the conversation, Hoff noted that the zoning regulations were more beneficial for his business. However, Holmes told Hoff that he was not interested because the hut was too small for his use. 2) Some time after June 26, 1990, Venettone called Hoff concerning zoning business, at which time they discussed the DeBlasio matter and Hoff gave Venettone his opinion that DeBlasio's property was in violation of the zoning laws. 3) Hoff participated in the 1990-91 zoning hearings regarding DeBlasio's property. As I stated above, defendants do not dispute that these events occurred. The district court found that this evidence was insufficient to enable a reasonable jury to find bias or improper motive, and thus to return a verdict in DeBlasio's favor, and I agree.

As the majority recognized, "the record does not show that Hoff ever 'pressured' Holmes to abandon the DeBlasio property in favor of his [son's]." Slip op. at 19. He had no contact with Holmes regarding this suggestion after early 1989. It is also undisputed that Holmes believed the other quonset hut property was inadequate for his business, and there is no evidence to suggest that Holmes would have relocated to that property. Furthermore, Venettone's own testimony shows that he called Hoff in his capacity as secretary of the board of adjustment and broached the subject of the DeBlasio zoning matter to get information about it. None of the above evidence is sufficient to support the inference that Hoff's actions as a member of the ZBA were influenced by personal bias or improper motive; no reasonable jury could draw this inference, as it would be based solely on mere speculation.

DeBlasio also contends that Hoff's involvement in the hearings reveals a conspiracy on the part of the ZBA to

violate his substantive due process rights. However, DeBlasio has provided insufficient evidence to support this theory. It would appear that discovery in this case lasted for twelve months, and yet DeBlasio has been unable to present any facts to demonstrate the existence of a conspiracy. While the district court prohibited DeBlasio from deposing the members of the ZBA as to the mental thought processes they employed in reaching the decision to deny a use variance, DeBlasio remained free to inquire into ex parte meetings, off-the-record communications, or discussions between Hoff and other ZBA members, or other manifestations of personal animus, and to probe for documentary evidence of such events. But after the close of lengthy discovery, DeBlasio has come forward with no evidence of any discussions, arrangements, promises, or agreements between Hoff and the other ZBA members to vote against DeBlasio. Furthermore, he has not identified a single occasion of contact between Hoff and any board member that would suggest improper conduct. Similarly, DeBlasio has supplied no evidence that would show Hoff was retaliating against Holmes because he did not wish to move to Hoff's son's property. Thus, no reasonable jury could find that a conspiracy existed within the ZBA to deprive DeBlasio of substantive due process.

Finally, DeBlasio has failed to offer any facts to show a causal link between Hoff's alleged personal bias and membership on the zoning board and the decisions affecting DeBlasio's property. First, the ZBA's vote to affirm Venettone's determination that DeBlasio's property was an expansion of the pre-existing nonconforming use exception was unanimous. Second, the vote to deny the application for a variance was four to three, with Hoff voting against. However, the grant of a variance requires five votes by law. *See* N.J. Stat. Ann. 40:55D-70(d). Even if Hoff did not participate in the vote, DeBlasio would have garnered only three votes in support of the variance, still rendering his application unsuccessful. Again, no reasonable jury could find that the ZBA's decisions were based on unlawful criteria. DeBlasio simply has been unable to provide evidence that would support his allegations. Because DeBlasio has, after adequate time for discovery, failed to make a showing sufficient to establish essential elements of

his case, upon which he will bear the burden of proof, I would affirm the district court's grant of summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

IV. *Conclusion*

The district court granted summary judgment in favor of the ZBA defendants on DeBlasio's substantive due process claim. The majority reverses this decision, finding that DeBlasio has offered sufficient evidence to survive summary judgment. In so doing, the majority holds that mere ownership is a sufficient property interest worthy of substantive due process protection. I disagree with that conclusion, and furthermore would affirm the grant of summary judgment as DeBlasio has failed to demonstrate he possesses a property interest cognizable under the Fourteenth Amendment. However, even under the majority's conclusion as to the requisite level of property interest, I would affirm summary judgment, as I believe DeBlasio has failed to present evidence that would permit a reasonable jury to find the ZBA's zoning decisions with regard to DeBlasio were based on personal bias, improper motive, or some other unlawful criteria.

I respectfully dissent.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5301

ALFRED DEBLASIO,

Appellant,

vs.

ZONING BOARD OF ADJUSTMENT FOR THE TOWNSHIP OF WEST AMWELL; HARRY K. RUSH; RAYMOND G. LINDBLAD; CHARLES A. BRITTON; GARY W. BLEACHER; DAVID L. DONDERO; STEWART PALILONIS; ROBERT FULPER, JR.; WERNER J. HOFF; EUGENE J. VENETTONE; BARBARA GILL; JOSEPH HELEWA; JAMES LAVAN; MRS. JAMES LAVAN,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 92-00926)

ARGUED MARCH 10, 1994

PRESENT: MANSMANN and LEWIS, *Circuit Judges,* and McKELVIE, *District Judge.**

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* Honorable Roderick R. McKelvie, United States District Judge for the District of Delaware, sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on March 10, 1994.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered May 6, 1993, be, and the same is hereby reversed insofar as the District Court's grant of summary judgment in relation to Mr. DeBlasio's substantive due process claim and New Jersey tort claims against the Zoning Board of Adjustment for the Township of West Amwell and remand for proceedings consistent with the opinion of this Court. We will affirm the District Court's dismissal of Mr. DeBlasio's procedural due process claim, claim for taking of property without just compensation, section 1985(3) claim, commerce clause claim, and state tort claims against the Lavans. The District Court's denial of Mr. DeBlasio's motion for leave to file an amended complaint, as well as the District Court's affirmance of the magistrate judge's discovery order are also affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. Douglas Sisk

Clerk

Dated: May 1, 1995

FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ALFRED DEBLASIO, *Plaintiff,*	:	Civil No. 92-926 (CSF)
v.	:	OPINION
ZONING BOARD OF ADJUSTMENT FOR THE TOWNSHIP OF WEST AMWELL, et al., *Defendant.*	:	

APPEARANCES:

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Attorney for Defendants Mr. and Mrs. James Lavan

FISHER, District Judge

Before the court are two motions for summary judgment. First is a motion brought by plaintiff, Alfred Deblasio, for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Also before the court is a motion brought by defendants the Zoning Board of Adjustment for West Amwell Township (ZBA) and its members (ZBA defendants) for summary judgment or, in the alternative, to dismiss the complaint. Defendants Mr. and Mrs. James Lavan, plaintiff's next-door neighbors, have requested that they be joined in the motion brought by the ZBA and the ZBA defendants. The court has granted their request. For the reasons set forth below, plaintiff's motion is denied and defendants' motion is granted.

A. FACTS

Plaintiff is the present owner of a parcel of land (the property) located in West Amwell Township, New Jersey. Although the property is now in an R-3 (three-acre minimum residential) zone, it is undisputed that the property contains an exemption from the zoning restrictions because of a nonconforming use by its prior owners, specifically an auto body repair shop, which predated the adoption of the West Amwell Zoning ordinance (ordinance) .

In the mid-1960s, George Guidotti purchased the property from Earl Brown, who had operated a general auto and auto body repair shop at the site. Brown's use was nonconforming. Following Guidotti's purchase of the property from Brown, the former also operated an automobile repair shop.

In 1967, after the ordinance was enacted, Gisella Niemier, a neighbor to the property, challenged the existence of the automobile repair shop on the property, alleging it was inconsistent with the R-3 zoning ordinance. Although Niemier was aware that the property, when previously owned by Brown, had been used as an automobile repair shop, she claimed that the use had been abandoned by Brown prior to the sale of the prop-

erty to Guidotti. In the alternative, Niemier claimed that even if the use had not been abandoned, Guidotti's use was an expansion of the pre-existing use.

After conducting a hearing, the ZBA determined that the use had not been abandoned and that Guidotti's use of the property as an automobile repair shop did not constitute an impermissible expansion of Brown's pre-existing nonconforming use and was within the limits of the use of the property when owned by Brown.

Plaintiff purchased the property from Guidotti in or about 1974. Thereafter, he filed an application with the ZBA for a variance to use the property for the storage of drywall construction materials and as the principal place for a drywall business. On December 23, 1974, following a hearing, the ZBA denied the application for the variance, concluding that such a business would be detrimental to the welfare of the Township. The plaintiff did not appeal this decision.

In 1979, plaintiff leased the property to Peter Holmes, the owner of Interstate Battery Company, a wholesaler of vehicle batteries. Interstate Battery began as a one-man, one-truck operation distributing approximately 2,000 batteries per year and expanded over a ten-year period to an operation with seven full-time employees, two part-time employees and five tractor-trailer trucks distributing upwards of 30,000 batteries per year.

On February 8, 1989, after a neighbor, defendant Virginia Lavan, filed a citizen's complaint regarding Interstate Battery, defendant Eugene Venettone, the West Amwell Township zoning official, inspected the site and concluded that the Interstate Battery operation was an expansion of the pre-existing nonconforming use and, therefore, was in violation of the local zoning ordinances.

On March 28, 1990, following Venettone's inspection, the plaintiff and Interstate Battery applied to the ZBA for an interpretation of the status of the property or, in the alternative, for a use variance to continue the present use, allowing Interstate Battery to continue its operation.

The ZBA upheld Venettone's decision that the current use of the property was in violation of the local zoning ordinances.

After several hearings regarding plaintiff's request for the use variance, the ZBA concluded that the proposed use substantially impaired the intent of the zoning plan and that plaintiff had failed to establish that the variance could be granted without substantial detriment to the public good. On June 25, 1991, the ZBA adopted a resolution of memorialization denying plaintiff's and Interstate Battery's application for a use variance permit for the property.

B. PROCEDURAL HISTORY

On February 28, 1992, plaintiff filed a four-count complaint against the ZBA, the ZBA defendants, and the Lavans, alleging violations under 42 U.S.C. §§ 1983 and 1985 of his due process rights pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, common-law claims for interference with contractual relations and interference with prospective economic advantage, and a violation of the Commerce Clause of the United States Constitution.

Plaintiff later appealed an order filed by United States Magistrate Judge John J. Hughes on November 16, 1992 that granted defendants' request pursuant to Federal Rule of Civil Procedure 26(b) to limit the scope of discovery so as to prohibit plaintiff from questioning the ZBA defendants about the mental process used by each to consider plaintiff's variance application. Defendants also brought a motion for summary judgment to dismiss all counts of plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) or, in the alternative, for summary judgment pursuant to Federal Rule of Civil Procedure 56(b) and (c). The court considered matters outside the pleadings and, therefore, treated defendants' motion as one for summary judgment, and not as a motion to dismiss.

On January 5, 1993, this court denied plaintiff's appeal and granted defendants' motion for summary

judgment as to count three, which alleged common-law tortious interference with contractual relations and prospective economic advantage, and count four, which alleged a violation of the Commerce Clause.

Furthermore, the court denied defendants' motion for summary judgment for absolute immunity regarding counts one and two, which alleged violations of 42 U.S.C. §§ 1983 and 1985, respectively, and also denied defendants' motion for summary judgment to dismiss defendants Palilonis, the attorney for ZBA, and Venettone.

Additionally, this court stayed consideration of defendants' summary judgment motion regarding counts one and two pending the outcome of this court's order that plaintiff amend these counts of his complaint within 20 days of the entry of its order so as to assert a cause of action with specificity or suffer dismissal of these claims. Plaintiff filed his amended complaint, as was required to withstand a motion to dismiss, on January 25, 1993. He also filed a motion to amend his complaint a second time, which this court denied an April 5, 1993.

Motions for reargument of this court's January 5, 1993, order were made by both parties. On February 17, 1993, both motions were denied. Pursuant to the Scheduling Order executed by Magistrate Judge John J. Hughes, fact discovery closed in this case on March 26, 1993.

C. PLAINTIFF'S SUMMARY JUDGMENT MOTION

Plaintiff advances two arguments in support of his motion for partial summary judgment on count one of his complaint. Plaintiff first alleges that his civil rights were violated because defendant Hoff, the Assistant Secretary of the ZBA, participated in the hearings concerning plaintiff's property while he had a pecuniary interest in the outcome of such hearings. Secondly, plaintiff argues that as a matter of law, his due process rights were violated by Hoff's participation in the hearings, as such participation created an appearance of impropriety. This court disagrees.

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Brown v. Hilton*, 492 F. Supp. 771, 774 (D.N.J. 1980). The burden of showing that no genuine issue of material fact exists rests initially on the moving party. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). This "burden . . . may be discharged by 'showing' . . . that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once a properly supported motion for summary judgment is made, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

There is no issue for trial unless the nonmoving party can demonstrate that there is sufficient evidence favoring the nonmoving party so that a reasonable jury could return a verdict in that party's favor. *Id.* at 249. In deciding a motion for summary judgment, the court must construe the facts and inferences in a light most favorable to the nonmoving party. *Pollock v. American Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3d Cir. 1986). The role of the court, however, is not "to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

In the instant case, plaintiff's first argument is that Hoff had a pecuniary interest in the outcome of the hearings and that, therefore, Hoff's participation in the hearings was a violation of the Due Process Clause of the Fourteenth Amendment. The pecuniary interest plaintiff advances in support of his argument consists of one unscheduled five-minute meeting outside a diner in 1988 between plaintiff's tenant, Holmes, and defendant Hoff. At this meeting, Hoff asked Holmes if he was interested in purchasing property which belonged to Hoff's son John as a new location for Interstate Battery. Holmes

told Hoff that the property was too small for Interstate Battery's needs and, therefore, he was not interested. Holmes was never contacted again by any person regarding John's property. *See* Holmes Dep. at 122:12-127:4.

Hoff had lent John money to purchase the property. John's brother, Werner, later purchased the property from John. Hoff did not participate in the May 22, 1990, and June 25, 1990, ZBA hearings, to avoid the appearance of a conflict of interest. *See* Hoff Dep. at 57, line 17-19. He did, however, begin to participate starting with the September 25, 1990, meeting, the first hearing on the appeal of plaintiff and Interstate Battery from the issuance of the notice of violation, and after, Hoff alleges, Werner had obtained *de facto* control over the property, but before the property was formally transferred. *See* Hoff Aff. at ¶¶ 30-34.

From this factual scenario, plaintiff alleges that Hoff had a substantial pecuniary interest in the outcome of the hearings and that his participation in the hearings violated his due process rights. Plaintiff relies on *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813 (1986), in support of his allegation that his due process rights have been violated. In *Lavoie,* the Supreme Court recited that although "the Constitution does not reach every issue of judicial qualification, 'it certainly violates the Fourteenth Amendment . . . to subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.' " *Id.* at 821-22 (citing *Tumey v. Ohio,* 273 U.S. 510, 523 (1927)).

Plaintiff further states that the Supreme Court in *Gibson v. Berryhill,* 411 U.S. 564 (1973), and the district court in *Wall v. American Optometric Association, Inc.,* 379 F. Supp. 175 (N.D. Ga. 1974), *aff'd sub nom. Wall v. Hardwick* 419 U.S. 888 (1974), imposed constitutional bans on competitors sitting as judges and that because plaintiff and Hoff were competitors, the latter should have been disqualified from the hearings.

This court not only disagrees with plaintiff's characterization of these two cases, but also disagrees with plaintiff's characterization of these two parties as competitors. First, the court in *Gibson* and *Wall* found that when a Board member has a substantial pecuniary interest in the outcome of the proceedings, a plaintiff is deprived of his right to an impartial tribunal. Mere theoretical competition alone, however, "has never been a sufficient predicate for an inductive conclusion of probable economic bias." *Rite Aid Corp. v. Board of Pharmacy of N.J.*, 421 F. Supp. 1161, 1169 (D.N.J. 1976), *appeal dismissed*, 430 U.S. 951 (1977).

As Holmes stated in his deposition, he told Hoff that the property was too small for Interstate Battery's needs and, therefore, he was not interested. Holmes was never contacted again by any person regarding John's property. *See* Holmes Dep. at 122:12-127:4. The court does not view this type of relationship between plaintiff and Hoff to be that of competitors.

This court does not find that the facts which plaintiff alleges in support of his contention that his due process rights were violated rise to the level of a constitutional violation. Specifically, the court does not agree that Hoff's interest rises to the level of a direct, personal, substantial pecuniary interest in the outcome of the hearings. Hoff also provided the court with an affidavit that stated, "[a]t no time during the hearings on either of the two applications filed by the plaintiff or Interstate Battery before the ZBA, did I ever feel that I could not be fair and impartial in my consideration of the issues presented to the ZBA." *See* Hoff Aff. at ¶ 36.

Even accepting the factual scenario plaintiff has presented, this court is not persuaded by plaintiff's allegations that his civil rights were violated as a result of Hoff's participation in the hearings concerning the property while he held a substantial pecuniary interest in the outcome of the hearings. As stated above, this court does not agree with plaintiff that Hoff's participation in the hearings satisfies the test enunciated in *Tumey* and

Lavoie to establish a due process violation. Accordingly, plaintiff's motion for partial summary judgment on this basis is denied.

In his reply papers, plaintiff provided the court with a copy of *Northwest Princeton Residents Association, Inc., v. Regional Planning Board of Princeton, et al.* (App Div. Docket No: A-1283-92T5F), decided on April 2, 1993. In that case, the court determined that there was a conflict of interest between the applicant and one of the Board members.

Specifically, the court found that a combination of the said Board member's husband's relationships were sufficient to find that the Board member had a conflict of interest. First, the Board member's husband, a senior named partner as well as a significant shareholder in a law firm, is a partner with the chairman and CEO of the applicant and with another director of the applicant in a commercial venture which owns and manages an office building. *Id.* at 6.

Also, the husband's law firm leases the third floor and is the largest tenant in the said office building. *Id.* Additionally, the law firm had represented the applicant's parent company from time to time over the five-year period preceding the application. *Id.*

In the instant case, even in light of the above-cited case, the court does not find the facts in this case to support plaintiff's allegations of a conflict of interest relationship between plaintiff and Hoff which would have warranted Hoff's disqualification from the hearings.

Plaintiff's second argument in support of his motion for partial summary judgment is that Hoff's participation in the hearings created an "appearance of impropriety." Plaintiff cites *In re Murchison,* 349 U.S. 133, 136 (1955), in support of his argument that 'justice must satisfy the appearance of justice.' *Id.* at 136 (citing *Offutt v. United States,* 348 U.S. 11 (1954)).

Plaintiff also relies on *In re School Asbestos Litigation,* 977 F.2d 764 (3d Cir. 1992), in support of this argument. In that case, the Third Circuit ordered a district

court judge to disqualify himself because of a combination of facts which the court believed together created an appearance of partiality that mandated disqualification. Such facts included attending "a predominantly pro-plaintiff conference on a key merits issue; the conference was indirectly sponsored by the plaintiffs, largely with funding that he himself had approved; and his expenses were largely defrayed by the conference sponsors with those same court-approved funds. Moreover, he was, in his own words, exposed to a Hollywood-style 'pre-screening' of the plaintiffs' case: thirteen of the eighteen witnesses the plaintiffs were intending to call gave presentations very similar to what they expected to say at trial." *Id.* at 782.

In this case, plaintiff alleges that Hoff's participation in the hearings gave the "appearance of impropriety" and, therefore, violated plaintiff's civil rights under the Due Process Clause of the Fourteenth Amendment. The only fact in support of this alleged violation relates to Hoff's participation in the hearings after the previously mentioned five-minute unscheduled meeting which took place in 1988, two years before the hearings even began. The court does not find this fact alone sufficient to create an "appearance of impropriety" to warrant Hoff to be disqualified. Accordingly, plaintiff's motion for partial summary judgment is denied.

D. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR DISMISSAL

Counts one and two of plaintiff's complaint are the only two remaining counts in this action. These counts allege that defendants violated 42 U.S.C. §§ 1983 and 1985, respectively, in that defendants' actions, performed under the color of state law, deprived plaintiff of his constitutionally guaranteed rights of liberty and property secured and guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution. Defendants' motion requests summary judgment on these two remaining counts. The standard for summary judgment has already been set forth above.

Alternatively, defendants are seeking dismissal of the complaint pursuant to Rule 19 of the Federal Rules of Civil Procedure for plaintiff's failure to join an indispensable party. Specifically, defendants argue that plaintiff's wife, Delores Deblasio, is the undivided fifty-percent owner of the property and, therefore, must be a party to this action. The court does not find it necessary to address defendants' Rule 19 argument, because defendants' motion for summary judgment is granted.

1. PLAINTIFF'S § 1983 CLAIM

To establish a cause of action under § 1983, it is necessary for a plaintiff to prove two elements: (1) whether the conduct complained of was committed by a person acting under color of state law and (2) whether this conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor,* 451 U.S. 527, 535 (1981), *overruled on other grounds, Daniels v. Williams,* 474 U.S. 327 (1986). That the conduct complained of was committed by a person acting under color of state law in the instant case is not disputed by either party.

Therefore, it is only necessary to evaluate the second element. Both parties appear to agree that there are only three possible constitutional violations to infer from plaintiff's Amended Complaint. These possible violations include a procedural due process violation, a substantive due process violation and a taking in violation of the Fifth and Fourteenth Amendments.

This court finds that when construing the facts and inferences in a light most favorable to plaintiff, his allegations of violations of procedural due process, substantive due process and a taking fail to rise to the levels of constitutional violations; therefore, defendants' motion for summary judgment as to plaintiff's § 1983 claim on these grounds is granted.

a. PROCEDURAL DUE PROCESS

The court will first address defendants' motion to dismiss plaintiff's § 1983 count on procedural due process grounds. To

establish a cause of action for a violation of procedural due process, plaintiff must prove that he was deprived of a protected property interest by a person acting under color of state law and that the state procedure for challenging the deprivations does not satisfy the requirements of procedural due process. *Parratt v. Taylor,* 451 U.S. at 537. *Midnight Sessions, Ltd. v. City of Philadelphia,* 945 F.2d 667, 680 (3d Cir. 1991), *cert. denied,* ___ U.S. ____ , 112 S. Ct. 1668 (1992).

It is the role of the court, and not the jury, to decide whether the scheme for challenging zoning ordinances satisfied procedural due process. *Midnight Sessions, Ltd.,* 945 F.2d at 682. The Third Circuit has held, "when a state affords a full judicial mechanism with which to challenge the administrative decision . . . , the state provides adequate process." *Id.* at 680 (citations omitted).

In this case, the court finds that the New Jersey legislature has enacted a mechanism under the Municipal Land Use Law (MLUL) which does satisfy procedural due process. This scheme enables a party to challenge the zoning officer's decision that plaintiff's property is in violation of the local zoning ordinance, as well as the ZBA's denial of plaintiff's application for a use variance permit for his property.

Plaintiff agrees with defendants that the state scheme was adequate, but states that it is irrelevant to this case because "defendants and conspirators failed to follow that scheme, and invented their own scheme to suit the purposes of the conspiracy against Mr. Deblasio. That failure provides an independent basis for a procedural due process claim." *See* Pl.'s Br. in Opp'n at 33-34. This court disagrees and finds, as a matter of law, that the procedure did not violate the requirements of procedural due process.

Specifically, N.J.S.A. § 40:55D-70 (a) and (b) provide that the ZBA shall have the power to hear and decide appeals of the zoning officer's enforcement of a zoning ordinance and hear and decide requests for an interpretation of a zoning ordinance. Furthermore, pursuant to subsections (c) and (d) of this statutory section, the ZBA

shall have the power to grant a request for a variance or other relief, so long as the variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zone ordinance.

Also, pursuant to N.J.S.A. § 40:55D-72, any interested party affected by any decision of an administrative officer of the municipality based on or made in the enforcement of the zoning ordinance or official map can appeal to the ZBA.

Last, pursuant to Rule 4:69-1 et seq. of the New Jersey Court Rules, plaintiff is entitled to a review, a hearing and relief by filing a complaint, before the expiration of 45 days from the time plaintiff received notice that his application was denied, in the Superior Court, Law Division, bearing the designation "In Lieu of Prerogative Writs." On March 9, 1993, plaintiff filed a state court action in the Superior Court of New Jersey, Hunterdon County, Law Division, against the same defendants and alleging the same claims, approximately twenty months after plaintiff had been notified of the ZBA's decision to deny plaintiff's request for a variance, rather than within the requisite 45-day period.

Plaintiff states that his failure to exhaust state remedies is not relevant in this case, because a § 1983 case does not depend upon exhaustion of state remedies. *Patsy v. Bd. of Regents of Fla.,* 457 U.S. 496, 516 (1982). Nevertheless, in the Third Circuit, a state provides adequate due process when it provides reasonable remedies to rectify a legal error by a local administrative body. *Bello v. Walker,* 840 F.2d 1124, 1128 (3d Cir. 1988), *cert. denied,* 488 U.S. 868 (1988) (quotations omitted) (citations omitted). Therefore, even assuming that plaintiff has a protected property interest, this court finds as a matter of law that the state procedure for challenging the ZBA's denial of a variance satisfies the requirements of procedural due process. Accordingly, defendants' motion for summary judgment on plaintiff's § 1983 claim of a procedural due process violation is granted.

b. SUBSTANTIVE DUE PROCESS

The test to determine whether a law comports with substantive due process is whether the law is rationally related to a legitimate state interest. *Rogin v. Bensalem Township*, 616 F.2d 680, 689 (3d Cir. 1980), *cert. denied sub nom. Mark-Garner Assocs., Inc. v. Bensalem Township*, 450 U.S. 1029 (1981); *Midnight Sessions, Ltd.*, 945 F.2d at 682. Whether a legislative scheme is rationally related to a legitimate government interest is a question of law for the court to determine. *Id.* at 682. However, "in disputed factual situations, determinations of the existence of bias, bad faith, improper motive, racial animus, or the existence of partisan political or personal reasons are properly made by the finder of fact." *Id.* at 683.

In the instant case, plaintiff's complaint alleges that defendants' denial of plaintiff's application for a use variance with respect to the property and defendants' determination that the property was in violation of a municipal zoning ordinance was based upon unlawful criteria. *See* Pl.'s Am. Compl. at ¶ 44(b). However, discovery is now closed and plaintiff has failed to offer any evidence to support such allegation.

The only possible "illegal conduct" which plaintiff might be referring to appears in Holmes's affidavit and recites that Hoff participated in the hearings in light of the five-minute conversation which took place between the two individuals. *See* Holmes Aff. This evidence is not sufficient to enable a jury to establish bias, bad faith, improper motive, racial animus, or the existence of partisan political or personal reasons and, therefore, to return a verdict in plaintiff's favor.

Furthermore, as stated above, Hoff also provided the court with an affidavit that stated, "[a]t no time during the hearings on either of the two applications filed by the plaintiff or Interstate Battery before the ZBA, did I ever feel that I could not be fair and impartial in my consideration of the issues presented to the ZBA." *See* Hoff Aff. at ¶ 36. Accordingly, defendants' motion for summary judgment on plaintiff's § 1983 claim of a substantive due process violation is granted.

c. TAKING WITHOUT JUST COMPENSATION

Even assuming that plaintiff's taking claim is ripe, plaintiff has failed to establish that defendants' denial of plaintiff's application for a use variance with respect to the property and defendants' determination that the property was in violation of a municipal zoning ordinance constitutes a taking. This Circuit has consistently taken a narrow view of what constitutes a taking of property by regulation. *Midnight Sessions, Ltd.*, 945 F.2d at 677; *Rogin*, 616 F.2d at 692.

In *Rogin*, the court stated that the Supreme Court would uphold the application of the law, unless such application destroys or severely diminishes the value of the property, even if the legislation prohibits a beneficial use to which individual parcels had previously been devoted, and thus causes substantial individualized harm. *Id.* at 690 (quotations omitted) (citations omitted).

In the instant case, the zoning ordinance which plaintiff alleges constitutes a taking was enacted in the 1960's, before plaintiff purchased the property. In 1979, when plaintiff rented the property to Holmes, plaintiff did not consult with the Township as to whether Interstate Battery's use of the property as a distributor of premanufactured lead acid batteries was permissible. Therefore, the legislature did not "take" property with a beneficial use which the property previously enjoyed.

In *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667 (3d Cir. 1991), the court stated that "a taking requiring compensation occurs only when a regulation that 'destroyed or adversely affected recognized real property interests' reaches a certain magnitude." *Id.* at 676 (citing *Keystone Bituminous Coal Ass'n v. Duncan*, 771 F.2d 707, 715 (3d Cir. 1985), *aff'd*, 480 U.S. 470 (1987)). In that case, the district court denied defendant's motion for summary judgment on the issue of a taking of property without just compensation, and the Third Circuit reversed this ruling. The Third Circuit stated that the denial of dance hall licenses did not destroy the value of the properties and, therefore, that appellants were not

denied all economically feasible uses of the properties. *Midnight Sessions, Ltd.*, 945 F.2d at 678.

Likewise, in the instant case, the denial of plaintiff's application for a use variance to enable Interstate Battery to remain on the property does not destroy the value of the property. Plaintiff states in his complaint that "the value of the property in its present use was $72,000.00 and that the value of the building lot after the removal of the building was $32,250.00." *See* Pl.'s Am. Compl. at ¶ 38(c).

In *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1031 (3d Cir. 1987), *cert. denied*, 482 U.S. 906 (1987), the court affirmed defendants' motion to dismiss plaintiff's allegation of a taking where the property had a value of $495,600.00 before the zoning change and a value of $52,000.00 after the zoning change. *Id.* at 1031. It stated that, "although there has been a substantial diminution in value, this property retains a substantial value that establishes the existence of residual economically feasible uses." *Id.*

In the instant case, not only was the zoning ordinance in effect before plaintiff purchased the property, thus putting plaintiff on notice, but plaintiff states in his complaint that the property would retain half of its value without Interstate Battery on the property. Accordingly, the court does not find that there has been a taking without just compensation and, therefore, defendants, motion for summary judgment on plaintiff's § 1983 claim of a taking without just compensation is granted.

2. PLAINTIFF'S § 1985 CLAIM

For plaintiff to establish a § 1985(3) violation, he " 'must allege and prove four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any

right or privilege of a citizen of the United States.' " *Wagner v. Township of Harmar,* 651 F. Supp. 1286 (W.D. Pa. 1987), *aff'd,* 826 F.2d 1058 (3d Cir. 1987) (citing *United Bhd. of Carpenters & Joiners of America, Local 610, AFL-CIO, et al. v. Scott et al.,* 463 U.S. 825, 828-29 (1983)).

Courts have construed the second element to require "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge,* 403 U.S. 88, 102 (1971). *Wagner v. Township of Harmar,* 651 F. Supp at 1288. In *Rodriguez v. Nazario,* 719 F. Supp. 52 (D.P.R. 1989), the court granted defendant's motion to dismiss plaintiff's § 1985(3) claim on the ground that being a member of a political party did not constitute a protected class under this statute. *Id.* at 56-57.

Plaintiff's allegation that he was discriminated against because he was not a political insider similarly fails to allege that he is part of any protected class which would bring him under the protection of § 1985. Accordingly, defendants' motion for summary judgment on plaintiff's § 1985 claim is granted. An order accompanies this opinion. No costs.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ALFRED DEBLASIO, *Plaintiff,*	:	Civil No. 92-926 (CSF)
v.	:	ORDER
ZONING BOARD OF ADJUSTMENT FOR THE TOWNSHIP OF WEST AMWELL, et al., *Defendant.*	:	

THIS MATTER having come before the court on motion by plaintiff, Alfred Deblasio, for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and on motion by defendants the Zoning Board of Adjustment for West Amwell Township and its members, Harry K. Rush, Raymond G. Lindblad, Charles A. Britton, Gary W. Bleacher, David L. Dondero, Stewart Palilonis, Robert Fulper, Jr., Werner J. Hoff, Eugene J. Venettone, Barbara Gill and Joseph Helewa, joined by defendants James Lavan and Mrs. James Lavan, for summary judgment or, in the alternative, to dismiss the complaint; and the court having considered the written submissions and oral argument of counsel; and for good cause shown,

IT IS on this 6th day of May, 1993,

ORDERED that plaintiff's motion for partial summary judgment be and hereby is denied; and it is further

ORDERED that defendants' motion for summary judgment be and hereby is granted and the matter is dismissed with prejudice.

/s/
CLARKSON S. FISHER
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 93-5301

ALFRED DEBLASIO,

Appellant,

vs.

ZONING BOARD OF ADJUSTMENT FOR THE TOWNSHIP OF WEST AMWELL; HARRY K. RUSH; RAYMOND G. LINDBLAD; CHARLES A. BRITTON; GARY W. BLEACHER; DAVID L. DONDERO; STEWART PALILONIS; ROBERT FULPER, JR.; WERNER J. HOFF; EUGENE J. VENETTONE; BARBARA GILL; JOSEPH HELEWA; JAMES LAVAN; MRS. JAMES LAVAN,

Appellees.

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE and SAROKIN, *Circuit Judges,* and McKELVIE, *District Judge.**

The petition for rehearing filed by the appellees in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who

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* Honorable Roderick R. McKelvie, United States District Judge for the District of Delaware, sitting by designation, whose vote is limited to panel rehearing only.

concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judges Greenberg, Hutchinson, Scirica, Cowen and Sarokin would have granted rehearing.

BY THE COURT,

/s/ Timothy K. Lewis
Circuit Judge

Date: May 30, 1995

No. 95-163

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

Supreme Court, U.S.
FILED
SEP 23 1995
CLERK

ZONING BOARD OF ADJUSTMENT FOR THE TOWNSHIP OF WEST AMWELL; HARRY K. RUSH; RAYMOND G. LINDBLAD; CHARLES A. BRITTON; GARY W. BLEACHER; DAVID L. DONDERO; STEWART PALILONIS; ROBERT FULPER, JR.; WERNER J. HOFF; EUGENE J. VENETTONE; BARBARA GILL; JOSEPH HELEWA,

Petitioners,

V.

ALFRED DEBLASIO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must the Supreme Court exercise its jurisdictional powers to decide legal issues in a case where no controversy exists.

2. Whether land ownership is a property interest worthy of substantive due process protection.

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No. 95-163

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

ZONING BOARD OF ADJUSTMENT FOR THE TOWNSHIP OF WEST AMWELL; HARRY K. RUSH; RAYMOND G. LINDBLAD; CHARLES A. BRITTON; GARY W. BLEACHER; DAVID L. DONDERO; STEWART PALILONIS; ROBERT FULPER, JR.; WERNER J. HOFF; EUGENE J. VENETTONE; BARBARA GILL; JOSEPH HELEWA,

Petitioners,

v.

ALFRED J. DEBLASIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, **ALFRED J. DEBLASIO**, respectfully requests that this Court deny the Petition for Writ of Certiorari

submitted by the above-named Petitioners referred to collectively as the ZBA Defendants.

OPINIONS OF THE COURTS BELOW

This case was commenced on February 28, 1992, by Respondent, Alfred J. DeBlasio, in the United States District Court for the District of New Jersey pursuant to 42 U.S.C. 1983 and 1985 when the ZBA Defendants deprived Respondent of his right to due process and freedom from government confiscation of his property. On May 6, 1993, the District Court granted the ZBA Defendants' motion for summary judgment dismissing all counts of Respondent's complaint. The Opinion and Order of the District Court is reported at 820 F. Supp. 876, and reprinted at 36a-53a in the Appendix to the ZBA defendants' Petition for Writ of Certiorari.

On May 1, 1995, the Court of Appeals for the Third Circuit entered a judgment and opinion which reversed the District Court's dismissal of Respondent's due process claim. The opinion of the Court of Appeals for the Third Circuit, dated May 1, 1995, is reported at 53 F.3d 592. The opinion is reprinted in the Petitioners' Appendix at pp. 1a-33a. On May 30, 1995, the Court of Appeals denied Petitioners' Petition for Rehearing with Suggestion for Rehearing In Banc by a vote of 9-5. The Order denying the Petition for Rehearing and refusing the Suggestion for Rehearing In Banc is unreported, and reprinted at 54a-55a of Petitioners' Appendix.

STATUTORY PROVISIONS

The statute at issue is 42 U.S.C. 1983.

STATEMENT OF THE CASE

In 1974, Respondent, Alfred J. DeBlasio, and his wife, Dolores, purchased a one acre parcel of land in rural West Amwell Township, New Jersey. At the time of the purchase by Respondent and his wife, there was a World War II surplus quonset hut on the property, which had been used by the prior owners as an auto body repair shop. 4a. The use of Respondent's property as an auto body repair shop extends back to the 1950s. Then, the property was owned by one Earl Brown who operated an auto body repair shop on the property. In about 1964, the Township of West Amwell enacted its first zoning ordinance. The zoning ordinance designated Respondent's property R-3, representing 3-acre minimum residential use. The ordinance did not permit a commercial operation, such as Brown's auto body repair shop, to be conducted on the property. However, New Jersey's Municipal Land Use Act, *N.J.S.A.* 40:55D-70 (d), permitted the continued commercial use of the property as a pre-existing, non-conforming use exception to zoning restrictions. 4a.

On October 18, 1966, Earl Brown sold the property to George Guidotti. As did Brown, Guidotti operated an auto body repair shop on the property, and in 1967, a neighbor complained that Guidotti's operations were an impermissible

expansion of the pre-existing, non-conforming use established by Brown. On May 30, 1967, a hearing was held before the West Amwell Township Zoning Board of Adjustment on the complaint. In that hearing, the zoning board of adjustment determined that Guidotti had neither abandoned nor expanded Brown's pre-existing, non-conforming use and that Guidotti's commercial operations were legal. 4a.

However, the Petitioners argued throughout the course of this litigation that a "second resolution" was adopted by the West Amwell Township Zoning Board of Adjustment on July 12, 1967. Petitioners argued that this so-called "second resolution" contained specific, detailed restrictions against specific commercial activity on Respondent's property. The mysterious "second resolution" was never found or produced by Petitioners. In deed, despite the alleged existence of this so-called "second resolution", and its attempted enforcement by the ZBA Defendants to deny Respondent the continued commercial use of his property, the ZBA Defendants readily acknowledged, as early as February, 1989, that the mysterious resolution had never been adopted, and, in fact, it never existed.

Beginning in 1979, and continuing to the present, Respondent leased the property to Interstate Battery, a wholesale battery distribution business owned by Peter Holmes. 4a. For nearly eleven (11) years, from 1979 to 1989, Interstate Battery operated a wholesale battery distribution warehouse on the

Respondent's property without even the slightest indication that its operations violated the pre-existing, non-conforming use permitted on the Respondent's property. Suddenly and unexpectedly, members of the West Amwell Zoning Board of Adjustment, Respondent's neighbors, and Township Officials embarked upon a campaign to rid the Respondent's property of Interstate Battery. This campaign included a petition drive, complaints to the zoning official, Eugene Venettone, and complaints to various municipal and state officials, including the mayor, the township attorney, the board of health, the environmental authorities and the police.

During the height of the campaign to oust Interstate Battery from the Respondent's property, Werner J. Hoff, a 30 year member of the West Amwell Zoning Board of Adjustment, approached Peter Holmes, the owner of Interstate Battery. 5a. Hoff sought to convince Holmes to vacate Respondent's property and move Interstate Battery's operations to the Hoff family's competing commercial property, equipped with a similar quonset hut. Hoff's competing commercial property was located just a few miles from the Respondent's property. The Hoff property was available for lease, having been left vacant by the demise of John W. Hoff's excavation business which had failed in or about 1988 or 1989. 5a.

Additionally, John Hoff's business failures resulted in severe financial losses to the Hoffs which exceeded $272,000.00, and agreements among

Petitioner, Werner J. Hoff, and his sons to clear the property of creditor liens. Hoff and his elder son, Dr. Werner E. Hoff, agreed to supply $272,000.00 to liquidate the debts that the younger son, John, had accumulated as the result of the failure of his excavation business. The Hoffs' agreement to provide funding for the debts of the younger son was memorialized in a Mortgage and Security Agreement dated February 7, 1989.

After 15 continuous years of uninterrupted commercial use and enjoyment of his property, Respondent's zoning problems began at precisely the same time that the Hoffs began to settle their financial obligations relating to their property. For example, the day after the Hoff family entered into their February 7, 1989, mortgage and security agreements, official action was taken against Respondent to remove Interstate Battery as Respondent's tenant. On February 8, 1989, Zoning Officer, Eugene Venettone, issued the first notice of zoning violation to Respondent. The notice of violation claimed that a storage trailer that had long been kept on Respondent's property constituted a zoning violation.

Within two weeks after the first notice of violation had been issued to Respondent, James and Virginia Lavan, on February 23, 1989, wrote directly to Petitioner, Werner J. Hoff, to enlist his aid in ousting Interstate Battery from the Respondent's property. 6a. Coincidentally, the Lavans were the in-laws of ZBA defendant, Robert Fulper, Jr.

One week later, on March 1, 1989, Philip Faherty, the West Amwell Township Attorney, wrote to Venettone demanding that Venettone issue a second notice of violation to Respondent, this time declaring that the entire operation of Interstate Battery was "in violation of the Township zoning ordinance". Faherty sent a copy of the letter to Hoff. These letters, combined with Hoffs' contemporaneous financial problems related to the competing commercial property, raised material issues of fact as to the existence of a conspiracy to misuse government power by issuing the first notice of violation and by taking subsequent zoning actions against Respondent.

When Venettone refused to issue a second notice of violation in response to Faherty's March 1, 1989, letter, Faherty wrote directly to Respondent's tenant, Peter Holmes, on March 29, 1989. Faherty's letter threatened Holmes with legal action if he did not cease his operations. Again, Faherty provided Hoff with a copy of the letter. However, Faherty failed to inform Holmes that neither Faherty nor any other township official had any authority to take legal action unless the zoning official, Venettone, issued a notice of violation. Thus, Faherty's March 29, 1989, letter to Holmes was a patently improper attempt to oust Interstate Battery from the Respondent's property.

Respondent vigorously disagrees with the dissenting opinion's view that "no reasonable jury could find that a

conspiracy existed within the ZBA to deprive DeBlasio of substantive due process". 32a. The coincidence between the Hoff family's financial woes, Hoff's pressure to force Holmes from the Respondent's property, the fierce campaign of the Lavans to oust Holmes from the Respondent's property after more than 10 years of peaceful co-existence, the improper actions of the township attorney attempting to rid the Respondent's property of Interstate Battery, the first notice of violation issued on February 8, 1989, the day after the Hoffs executed their family agreements to bail out John Hoff's failed business, and an attempt to issue a second notice of violation, all within an extremely brief period of time, effectively eliminates chance as an explanation for these occurrences. Each of these actions was undertaken by different persons, each was solely directed at ousting Interstate Battery from Respondent's property and together the evidence provides ample proof of a conspiracy to deprive Respondent of the continued commercial use of his property through a misuse of governmental power.

On May 22, 1990, Respondent appeared before the Zoning Board of Adjustment, applying for a clarification of the status of his property. Hoff immediately recused himself from any proceedings involving the Respondent's property, as did Robert Fulper, Jr., another member of the zoning board of adjustment. Hoff did not explain his recusal. Fulper recused himself because he was married to the Lavans' daughter. Despite the recusal of

Hoff and Fulper, both of them remained in the hearing room in violation of the West Amwell zoning ordinance. Hoff continued to act as secretary to the zoning board of adjustment and fully participated in the proceedings during the hearing.

In the May 22, 1990, hearing before the zoning board of adjustment, the members quickly determined that the board had no jurisdiction to "clarify" the status of the property, as there was no outstanding notice of violation. However, despite its lack of jurisdiction, the board scheduled a second hearing and subpoenaed Venettone to appear and explain why there was no notice of violation. Thus, instead of concluding the Respondent's case before the board, it continued.

On June 26, 1990, the zoning board of adjustment conducted another hearing regarding Respondent's property. Venettone appeared and was asked whether he had cited Respondent for a zoning violation to which Venettone responded that he had not. Respondent then withdrew his application for clarification, as no issue remained before the board. Again, this should have ended the matter. However, between the June 26, 1990, zoning board hearing and August 7, 1990, Hoff met privately with Venettone and pressured Venettone into issuing a second notice of violation to Respondent. On August 7, 1990, Venettone issued a second notice of violation to respondent claiming that "violations exist in contravention of the Zoning Ordinance of West Amwell Township

in that: Expansion of a pre-existing, non-conforming use..... in violation of Resolution adopted July 12, 1967". Of course, as stated previously, no such 1967 Resolution ever existed.

The second notice of violation gave no description of the violations that Venettone allegedly found. On August 30, 1990, the zoning board of adjustment deemed this notice of violation sufficient to give it jurisdiction over Respondent. From that point on, Respondent faced a zoning board of adjustment that included Hoff as a full participant, as Hoff no longer pretended to recuse himself. Hoff offered no explanation of why he was ignoring his prior recusal. More remarkably, Hoff's participation in the Respondent's hearings before the zoning board of adjustment was not questioned by the board's attorney or by its chairman or by any other member of the zoning board of adjustment.

The second notice of violation issued by Venettone expressly relied upon a purported "Resolution" dated July 12, 1967, as the basis for the alleged zoning violation. However, since no resolution dated July 12, 1967, or any other date, ever existed which contained restrictions on the use of Respondent's property, Venettone and the board members took the legally untenable position that a proposed resolution, discussed in the minutes of a May, 1967 zoning board meeting was binding law. Consequently, Respondent's commercial use of his land was declared illegal, based solely upon a

24 year old proposal that had never been enacted, adopted or even existed.

At the time that Venettone issued the second notice of violation to Respondent on August 7, 1990, Hoff's need for a tenant had intensified. Hoff's property had laid vacant for at least 18 months since the February 7, 1989, $272,000.00 Mortgage and Security Agreement was executed by Hoff and his children. The monthly expenses of over $2,000.00 per month continued to be incurred by the Hoffs.

Faced with the loss of the continued commercial use of his property, Respondent was forced to appeal Venettone's August 7, 1990, notice of violation and, in the alternative, apply for a variance that would permit the continuation of Interstate Battery's operation. Respondent was opposed by Hoff at every turn. When Respondent's appeal of Venettone's August 7, 1990, notice of violation came to a final vote on October 23, 1990, Hoff did not abstain, even though he and his son, Dr. Werner E. Hoff, still held a $272,000.00 mortgage on the Hoffs' competing commercial property, the Hoffs still held title to the property, Hoff was managing the property and the property remained vacant. Instead, Hoff voted against Respondent's appeal from the second notice of violation.

Prior to the zoning board of adjustment's vote on the appeal of the August 7, 1990, notice of violation, the board of adjustment attorney, Palilonis,

specifically instructed the board members that their "obligation" in the hearings was to determine whether the present use of the Respondent's property by Interstate Battery was "more intense" than the prior use.

On November 27, 1990, the Board issued a resolution that declared Interstate Battery's use of the Respondent's property illegal, but failed to contain a finding that the intensity of Interstate Battery's use was greater than the intensity of the prior use. The zoning board of adjustment, ignoring Palilonis' instructions that intensity of use was determinative in the appeal, relied instead upon the descriptions of operations in the hand-written minutes of the May 30, 1967 board hearings. The board erroneously considered the descriptions in the May 30, 1967, minutes to be legally binding restrictions which could not be exceeded by Respondent on the property. These descriptions related to the prior owner, Earl Brown's hours of operation, days of operations, number of employees, and the availability of the grounds for business operations. However, these descriptions of operations were never converted into legally binding limitations on the property and have never been found in any zoning board of adjustment enactment or resolution.

Not content to merely vote against Respondent's appeal, Hoff took an active role in the drafting of the November 27, 1990, resolution, which was indisputably the responsibility of the board attorney, Palilonis, not Hoff. In the November 27,

1990, zoning board meeting, Hoff criticized the resolution drafted by Palilonis because it was not strong enough. Hoff also made a motion to amend Palilonis' draft resolution to contain specific language that Interstate Battery did expand and exceed pre-existing, non-conforming use. Hoff then voted in favor of his own motion which was passed.

Following the November 27, 1990, hearing, wherein the board rejected Respondent's appeal of the August 7, 1990, notice of violation, Respondent's variance hearing began. As expected, Hoff led the opposition. Hoff read into the record a letter from the Lavan's counsel, which stated that "Interstate Battery should cease and desist" operations on the Respondent's property immediately. Hoff also expressed his personal criticism of Respondent's attorneys, and stated that the zoning board of adjustment "has been hampered by the methods used to present this case." Hoff also took upon himself the opportunity, on behalf of the board, to cross-examine Holmes, who Hoff previously solicited to become a tenant for his property. During Hoff's cross-examination of Holmes, Hoff volunteered that he had difficulty in determining if the Respondent's property could support the use as described by Holmes. Hoff also offered his opinion that he was "concerned" that the Respondent's Property did not "have enough area to conduct business as described." Hoff then recorded his own negative comments in the official minutes.

On March 26, 1991, and April 23, 1991, Respondent presented expert witnesses who testified concerning noise levels and site planning. The noise level expert testified that the noise levels from the property were so low that more noise was created by passing traffic. The site planner testified that Interstate Battery's use was less intense than the prior owner's use and suggested methods of site alteration which would further minimize the intensity of the operation. The testimony of Respondent's experts was uncontroverted. No evidence disputing any of their findings was ever presented by the zoning board of adjustment.

On May 28, 1991, Hoff made a motion to have the zoning board of adjustment deny the respondent's variance application. Hoff moved to deny Respondent's variance even though the uncontroverted evidence proffered by Respondent at the two variance hearings unequivocally proved that the use of Respondent's property by Interstate Battery was less intense than that of the prior owners. A majority of seven voting board members was required to pass this motion. Hoff's motion to deny the Respondent's variance application was carried on a 4 to 3 vote with Hoff casting the deciding vote.

REASONS TO DENY THE WRIT

I. Whether the Property Interest Standard for Maintaining a Substantive Due Process Claim is Mere Ownership or Legitimate Claim of Entitlement, Respondent's Protected Property Interest Satisfies Either Standard. Therefore, No Controversy Exists for the Supreme Court to Decide in This Case.

Before reaching the merits of a party's substantive due process claim, Courts are required to first determine whether the property rights asserted by the party claiming deprivation could have constituted protected property interests within the meaning of the fourteenth amendment. In the context of a zoning dispute, to state a claim under the fourteenth amendment for deprivation of property without due process of law a person must establish that he had a valid property interest in some benefit that was protectible under the fourteenth amendment at the time that he was deprived of the benefit. *Board of Regents* v. *Roth*, 408 U.S. 564, 576-77, 92 S.Ct. 2701, 2708-09, 33 L.Ed. 548 (1972); *G.T. Scott* v. *Greenville County*, 716 F.2d 1409, 1418 (4th Cir. 1983).

In *Roth*, the Supreme Court noted that to determine whether a property interest in some benefit rises to the level of a right protectible under the fourteenth amendment, courts therefore must look to "existing rules or

understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 408 U.S. at 577, 92 S.Ct. at 2709.

Under New Jersey state and local law, Respondent, Alfred J. DeBlasio, possessed fourteenth amendment protected interests in the zoning variance which he was forced, by the ZBA defendants, to apply for, and in the general commercial use of his property which, pursuant to *N.J.S.A.* 40:55D-70 (d), permitted Respondent to enjoy the continued commercial use of the property as a pre-existing, non-conforming use exception to the state zoning restrictions. Therefore, because Respondent's property was zoned and used commercially at the time that his dispute with the ZBA Defendants arose, Respondent had protectible fourteenth amendment property rights in the commercial use of his property. Further, there was sufficient evidence presented below that a jury could reasonably find that the Respondent had been deprived of those benefits in violation of the fourteenth amendment.

In the present case, it simply makes no difference whether the property interest standard for maintaining a substantive due process claim under the fourteenth amendment is "mere ownership" of the property or whether, as Petitioners argue, the correct standard is legitimate claim of entitlement. In either case, Respondent meets the standard. Therefore, as a matter of law,

Respondent has a protected property right and is entitled to maintain a substantive due process claim regardless of which standard applies. Consequently, the issue raised by Petitioners' Writ simply has no bearing on the outcome of this case.

While Petitioners are quick to argue the apparent "remarkable" conflict among the various federal appellate courts, they fail to address the more critical question of whether the Respondent, in the present case, would have fared any differently had the majority in the Third Circuit applied the legitimate claim of entitlement standard. While dwelling on the so-called "conflict", Petitioners offer no guidance on what the legitimate claim of entitlement standard entails, nor whether the Respondent's fourteenth amendment claim would have been dismissed had a standard different than mere ownership been applied by the Third Circuit. In deed, even if, as Petitioners argue, there is a conflict among the federal appellate courts, the resolution of that issue by the Supreme Court will not effect the outcome of the present case.

The Second Circuit in *Yale Auto Parts, Inc.* v. *Johnson*, 758 F.2d 54 (2d Cir. 1985), a case involving a Connecticut zoning dispute, stated that "the question of whether an applicant has a legitimate claim of entitlement to the issuance of a license or certificate for fourteenth amendment purposes should depend on whether, absent the alleged denial of due process, there is either a

certainty or a very strong likelihood that the application would have been granted." *Id* at 59.

Applying the *Yale Auto Parts* test, if the Respondent's property was zoned and used commercially, as it had been since the 1950s when owned by Earl Brown, Respondent very likely would have been entitled to the benefit of the commercial use of his property *but for* the alleged improper conduct of the ZBA Defendants. It was an undisputed proven fact below that the commercial use of the Respondent's property by Interstate Battery was a less intense use than that conducted by the prior owners, Brown and Guidotti. Having proven that crucial fact by uncontroverted evidence, Respondent was *entitled* to have his variance application granted by the ZBA defendants, and to be permitted to continue the commercial use of his property with Interstate Battery as his tenant. Under New Jersey law, the ZBA defendants had no discretionary authority to interfere with the Respondent's right to lease his property to Interstate Battery once Respondent proved that he was entitled to the zoning variance. Nor did the ZBA Defendants have the right to force Respondent to apply for a variance to save his property from the loss of its commercial use. Respondent's variance application was precipitated in response to a notice of violation which cited Respondent for allegedly violating a 1967 "resolution" which never existed.

Respondent's property complied with the applicable state and municipal

requirements for its continued commercial use. In two hearings before the ZBA Defendants on March 26, 1991 and April 23, 1991, Respondent presented expert testimony concerning noise levels and site planning. These experts testified that the noise levels from the property were so low that more noise was created by passing traffic. The site planner testified that Interstate Battery's use was less intense than that of the prior owners. This expert testimony was uncontroverted. Consequently, there was no element of discretion of judgment remaining for the ZBA Defendants to exercise in determining whether to grant or deny Respondent's variance. Having satisfied the burden of proof imposed by the local zoning ordinance to prevail on his application for a variance, the ZBA Defendants, led by self-interested Werner J. Hoff, denied the Respondent's variance application by a 4 to 3 vote with Hoff casting the deciding vote.

The ZBA Defendants improperly determined that Interstate Battery's use of the Respondent's property was an expansion of the pre-existing, non-conforming use when there was not one shred of evidence proving that the continued commercial use of Respondent's property by Interstate Battery was more intense than the use of the property by the prior owners. In deed, all of the evidence was to the contrary. Hence, the Petitioners' improper conduct, motivated by Hoff's personal and political reasons, subjected Respondent to various approval processes solely to prevent Interstate Battery from continuing to occupy and use

Respondent's property. It must therefore be concluded that even under the *Roth* standard of legitimate claim of entitlement, Respondent had a protectible property interest under the fourteenth amendment.

There is no doubt that had the ZBA Defendants not been motivated by purely personal and political reasons, it was a certainty or, at the very least, a very strong likelihood that Respondent's variance application would have been granted. Stated differently, but for the improper conduct of the ZBA defendants, Respondent's variance application was certain to have been granted. The Municipal Land Use Act of the State of New Jersey, *N.J.S.A.* 40:55D-70(d), entitled Respondent to enjoy the continued commercial use of his property under the pre-existing, non-conforming use exception to the state zoning restrictions.

Nevertheless, despite its conformity with state law, the ZBA Defendants sought to restrict Respondents' use of the property by issuing a notice of violation on August 7, 1990, declaring that the use of Respondent's property was "in violation of Resolution adopted July 12, 1967." A Resolution dated July 12, 1967, restricting the use of Respondent's property, never existed, and one was never produced in the litigation. Accordingly, where property complies with applicable state and municipal requirements, there is no discretion or judgment remaining for the ZBA defendants to exercise in determining whether or not

to grant Respondent's variance application. *See Sullivan* v. *Town of Salem*, 805 F.2d 81, 85 (2d Cir. 1986). *See also*, Bello v. *Walker*, 840 F 2d 1124, 1129-1130 (3rd Cir. 1988) in which the Third Circuit reversed a grant of summary judgment rendered in favor of a municipal zoning board where the plaintiff presented sufficient evidence to demonstrate that the municipal council's denial of a building permit was motivated by purely personal and political reasons.

Despite its adherence to the entitlement inquiry in land use regulation cases, the Second Circuit has not hesitated, when possible, to criticize its application. In *RRI Realty Corp.* v. *Inc. Village of Southhampton*, 870 F. 2d 911 (2d Cir. 1989), the Court expressed its own dissatisfaction with the entitlement inquiry by stating at p. 917 that,

> It is not readily apparent why land regulation cases that involve applications to local regulators have applied the *Roth* entitlement test to inquire whether an entitlement exists in what has been applied for---whether a zoning variance, a business license, or a building permit--- instead of simply recognizing the owner's indisputable property interest in the land he owns and asking whether local government has exceeded the limits of substantive due process in regulating the plaintiff's use of his property by denying the

> application arbitrarily and capriciously. As Justice Stevens has observed, "the opportunity to apply for [a zoning amendment] is an aspect of property ownership protected by the Due Process Clause of the Fourteenth Amendment." Citing, *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 683, 96 S.Ct. 2358, 2366, 49 L.Ed.2d 132 (1976). Indeed, the entitlement inquiry will not often aid the analysis in this context.

In deed, the only justification offered by the Second Circuit in *RRI Realty Corp.* for applying the entitlement test to land use cases in the Second Circuit is its concern that if the entitlement test is not applied with considerable rigor, that federal courts will become "zoning boards of appeals". *Id.* at 918. However, this concern was disspelled by Judge Lewis, who delivered the opinion for the majority below, when he stated that

> We do not share the dissent's legitimate concern that this standard "will invite the land owner into any federal court to challenge even the most mundane and routine zoning decisions." Dis. Op. Typescript at 26. The standard we articulate today is implicit in *Bello*, and *Bello* has not overburdened the federal courts by inviting meritless landowner suits. Moreover, we note by way of analogy that

> persons denied licenses required for the practice of certain occupations are not required to demonstrate entitlement to the license sought in order to state a substantive due process claim. To state a substantive due process claim, such persons need only assert that the license sought was arbitrarily denied. *See RRI Realty Corp.*, 870 F.2d at 917-18 n.4 (citing *Wilkerson* v. *Johnson*, 699 F.2d 325 (6th Cir. 1983). This rule has not invited abuse of the federal courts by persons denied licenses to pursue particular occupations.

Appendix at 17a-18a.

In *Brady* v. *Town of Colchester*, 863 F.2d 205 (2d Cir. 1988), the Second Circuit, while paying lip service to the entitlement test enunciated in *Roth* and *Yale Auto Parts*, found the requisite protectible property interest to be an aspect of the rights enjoyed by the plaintiff as owner of his property. And, in the majority opinion below, the Third Circuit agreed with the observation of the Court of Appeals for the Second Circuit: in *Roth*, the Court announced that a property interest within the meaning of the Fourteenth Amendment "includes not only what is owned but also, in some limited circumstances, what is sought." *RRI Realty Corp.* v. *Inc. Village of Southampton*, 870 F.2d 911, 915 (2d Cir. 1989) (citing *Roth*, 408 U.S. at 577).

The legitimate claim of entitlement test is fundamentally unfair and inequitable. It shackles a landowner with the added burden, when asserting a substantive due process claim, of proving entitlement to a variance, permit or license by a certainty or a very strong likelihood, when persons who are denied occupational licenses need only show that their license application was arbitrarily denied to state a claim. *See Wilkerson* v. *Johnson*, 699 F.2d 325 (6th Cir. 1983). *See also, RRI Realty Corp.* at 917-18. Conceivably, a person, like Respondent in the present case, who derives income from the commercial use of his land could be deprived of asserting a substantive due process claim even though local land use regulators acted arbitrarily, when an applicant for an occupational license might not face the same obstacle. Focusing on the authority of the local regulator thereby permits the threshold rejection of some federal due process claims, without awaiting exploration of whether the regulator acted so arbitrarily as to offend substantive due process in the particular case. Accordingly, the legitimate claim of entitlement standard is an unfair test to impose upon a landowner seeking to vindicate his constitutional rights through the maintenance of a fourteenth amendment claim.

II. There Was Either a Certainty or Very Strong Likelihood That Respondent's Variance Application Would Have Been Granted. Therefore, Under the Legitimate Claim of Entitlement Standard Respondent is Entitled To Maintain His Fourteenth Amendment Claim.

The legitimate claim of entitlement test depends on whether, absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted. *Yale Auto Parts, Inc.*, 758 F.2d at 59. This standard was intended to be a tool capable of measuring particular applications to determine if the applicant had a legitimate claim of entitlement based upon the likelihood that without the due process violation that application would have been granted. *Sullivan*, 805 F.2d at 85.

In denying Respondent's application for a variance, which would have permitted the continued commercial use of Respondent's property by Interstate Battery, the ZBA Defendants offered no reason why Respondent's application had been denied. Nor did the ZBA Defendants follow the instructions set down by the ZBA attorney, Palilonis, who instructed the zoning board members that in considering and deciding the Respondent's variance application, the board must find that the use was more or less intense than that of the prior owners. The board made no such findings as the

uncontroverted evidence proffered by the Respondent and his experts proved that the use of Respondent's property by Interstate Battery was a less intense use. Therefore, there was no lawful basis for refusing to grant the Respondent's variance application on any ground, and, in deed, no ground for denying it was stated. It is clear from the well-developed facts of this case that *but for* the improper conduct of the ZBA Defendants, Respondent's variance application conformed in all respects to the requirements for a variance, and that Respondent was thus entitled to it.

The impermissible denial of Respondent's variance application came out of thin air. It was not derived from any existing legislation or administrative standard such as the West Amwell Township zoning ordinance, nor was the denial supported by any evidence in the record. In deed, as previously stated, Respondent's evidence which proved that the use of his property by Interstate Battery was less intensive than that of the prior owners was uncontroverted. It is clear that the ZBA defendants did not have the authority to act as it did under New Jersey law in denying Respondent's variance application. Given this, Respondent has satisfied the *Yale Auto Parts* test by proving that he has a protectible fourteenth amendment property interest. Furthermore, where, as here, the government's discretion is limited by law and the government acts outside that limitation, or where the government's articulated reason for denying the

benefit is without basis in law, and no other lawful impediment to granting the application exists, then a plaintiff may assert an entitlement sufficient to support a constitutional claim.

III. Where a Landowner's Constitutional Rights Are Infringed By Local Zoning Actions, It Is Clear That Federal Courts Are Duty Bound To Protect The Landowner's Constitutional Interest.

The ZBA Defendants had no authority under state or local law to deny Respondent's application for a zoning variance or to force Respondent to apply for a variance when the ZBA Defendants arbitrarily and capriously sought to enforce a non-existent resolution to eliminate the commercial use of Respondent's property. By subjecting Respondent to the overall approval process in circumstances where the underlying motivates for doing so were purely personal and politically motivated, one must conclude that there was no rational basis for the ZBA Defendants' actions, and that as a result, the ZBA Defendants violated Respondent's rights to substantive due process. In zoning dispute cases, the principle of substantive due process assures property owners of the right to be free from arbitrary, capricious and irrational zoning actions. *See Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). When a landowner's

constitutional rights are infringed by local zoning actions, it is clear that the duty of the federal courts is to protect the constitutional interest of the landowner. *Sullivan v. Town of Salem*, 805 F.2d at 82.

In the facts of this case, the decision of the Third Circuit Court of Appeals to reverse and reinstate Respondent's substantive due process claim would not have been any different regardless of whether the Court applied the legitimate claim of entitlement or mere ownership standard. Where, as here, no controversy exists, this court should, as it must, deny review.

CONCLUSION

For the foregoing reasons, Petitioners' request for a writ of Certiorari should be denied.

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(3)

Supreme Court, U.S.
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No. 95-163

In the
Supreme Court of the United States
October Term, 1995

ZONING BOARD OF ADJUSTMENT FOR THE TOWNSHIP OF WEST AMWELL; HARRY K. RUSH; RAYMOND G. LINDBLAD; CHARLES A. BRITTON; GARY W. BLEACHER; DAVID L. DONDERO; STEWART PALILONIS; ROBERT FULPER, JR.; WERNER J. HOFF; EUGENE J. VENETTONE; BARBARA GILL; JOSEPH HELEWA,
Petitioners,

v.

ALFRED DEBLASIO, Respondent.

On Writ of Certiorari To the United States Court of Appeals For the Third Circuit

BRIEF OF THE STATES OF NEW JERSEY, et al. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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No. 95-163

In the

Supreme Court of the United States

October Term, 1995

ZONING BOARD OF ADJUSTMENT FOR THE TOWNSHIP OF WEST AMWELL; HARRY K. RUSH; RAYMOND G. LINDBLAD; CHARLES A. BRITTON; GARY W. BLEACHER; DAVID L. DONDERO; STEWART PALILONIS; ROBERT FULPER, JR.; WERNER J. HOFF; EUGENE J. VENETTONE; BARBARA GILL; JOSEPH HELEWA,

Petitioners,

v.

ALFRED DEBLASIO,

Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals For The Third Court

BRIEF OF THE STATES OF NEW JERSEY, et al. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI CURIAE

The Third Circuit's decision in this case will allow virtually any property owner who is aggrieved by a state or local land use decision to mount a federal claim alleging a violation of substantive due process, regardless of whether the property owner has pursued available relief under state law or had any reasonable expectation of a favorable land

use decision. This result is of concern to amici states because like the local zoning board petitioners here, state agencies also regulate land use and engage in land use planning. For example, in New Jersey state agencies regulate development in specified regions, such as the Hackensack Meadowlands, the Pinelands and the coastal zone, or regulate development on certain categories of land, such as wetlands or flood hazard areas. As is the case with applicants for local zoning permits, applicants for state permits to develop land have a full panoply of state review procedures available to them. These procedures are well established and annually resolve substantial numbers of land use disputes.

Notwithstanding the widespread use and availability of these state remedial procedures, the Third Circuit has now held that a property owner need only allege that a decision limiting an intended land use was reached arbitrarily or irrationally to state a substantive due process claim. Thus, the Circuit has established a standard which will allow virtually any state or local land use dispute to also become a federal case.

By this holding, the Third Circuit has crafted a course sharply at variance with other Circuits and out of step with recent decisions of the Court in other due process cases. If the standard enunciated by the Third Circuit in this case is allowed to stand, amici will be faced with the likelihood of sharply escalating costs of litigation in even the most routine land use matters, with no corresponding benefit to the public health, safety or welfare. In addition, land use decisions made by amici on a daily basis will become subject to potential review by federal courts under the nebulous standards of substantive due process despite those courts' lack of familiarity with local land use issues and the availability of state remedies, and state and local development authorities will be forced to make decisions

knowing that if they do not grant an application, they may become subject to a federal lawsuit for damages.

ARGUMENT

I. THE THIRD CIRCUIT'S UNWARRANTED EXPANSION OF FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS JURISDICTION IN LAND USE CASES PRESENTS AN ISSUE REQUIRING RESOLUTION BY THE COURT.

A. The Standard Set By The Third Circuit In This Case Is Equivalent To No Standard At All And Will Result In Unnecessary And Duplicative Federal Litigation Of Ordinary Land Use Disputes.

The petitioners in this case seek review of the Third Circuit's determination that in the context of land use regulation, a land-owning plaintiff states a substantive due process claim by alleging that a decision limiting an intended land use was reached arbitrarily or irrationally. This standard is so broad that it amounts to no standard at all. If it is not modified, virtually every state and local land use dispute will state a substantive due process claim entitling the owner to bring a federal lawsuit seeking damages against state and local officials.

Although the Third Circuit set an extraordinarily broad standard in this case, the land use dispute to which it applied its "standard" was hardly extraordinary. The dispute involved a nonconforming use in a residential zone

on property owned by respondent DeBlasio, and DeBlasio's after-the-fact allegation that one member of the municipal Zoning Board of Adjustment improperly participated in an action denying a variance. The property was zoned for three acre residential use when DeBlasio purchased it; however, prior to the adoption of the zoning ordinance the property had contained a one-man auto body shop and so was exempted from the zoning restriction. After DeBlasio took title he applied for a variance to use the site for storage of drywall construction materials and as the principal place for a drywall business. That variance request was denied and DeBlasio did not appeal. Several years later, DeBlasio leased the property to Peter Holmes. Holmes used the property to conduct a business wholesaling vehicle batteries. He started as a one-man, one-truck operation and expanded over a ten-year period to an operation with seven full-time employees, two part-time employees and five tractor-trailer trucks distributing approximately 30,000 batteries per year.

Following a neighbor's complaint to the municipality, DeBlasio applied to the local zoning board of adjustment ("ZBA") for an interpretation of the zoning status of the property or, in the alternative, for a use variance to continue the present use. The ZBA unanimously determined that Holmes' use violated the ordinance and denied DeBlasio's request for a variance to continue the current use; the voting members of the Board included one member whom DeBlasio later alleged had a conflict of interest. DeBlasio was given six months to cease the use.

Approximately eight months later (but without having complied with the requirement to cease) DeBlasio filed a complaint in federal court alleging, among other things, violations under 42 U.S.C. §§ 1983 and 1985 of his due process rights pursuant to the Fifth and Fourteenth Amendments to the United States Constitution. DeBlasio did not file an appeal of the ZBA decision in state court

before bringing his federal claims, even though he had an automatic right to do so under state law. New Jersey Court Rule 4:69-1.[1]

The District Court granted the ZBA's motion for summary judgment on all of DeBlasio's federal claims, including claims alleging a taking of the property without just compensation and a violation of procedural due process. The Third Circuit affirmed the dismissal of the takings and procedural due process claims, but reversed the District Court's grant of summary judgment on DeBlasio's state tort claim and substantive due process claim.

At the outset of its discussion of DeBlasio's substantive due process claim the Third Circuit complained of the "paucity of Supreme Court guidance." DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell, 53 F.3d 592, 598 (3d Cir. 1995). It then reviewed prior Third Circuit decisions considering which property interests were protected by the concept of substantive due process and ultimately concluded:

> [I]n the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached. [53 F. 3d at 601].

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[1] DeBlasio subsequently filed a state court appeal which was dismissed as untimely.

As observed by the dissent, this "standard" is so broad that it will transform virtually every local or state land use dispute, however trivial, into a federal substantive due process claim. DeBlasio, supra, 53 F. 3d at 605. Thus, the Third Circuit's decision can only be expected to increase the number of frivolous cases requiring defense, and to encourage state and local decision makers to approve questionable land use applications in order to avoid liability for damages.

The Third Circuit began its substantive due process analysis by observing that "the issue of whether and when state-created property interests invoke substantive due process concerns has not been decided by the Supreme Court." DeBlasio, supra, 53 F.3d at 598 (citing Reich v. Beharry, 883 F.2d 239, 243 (3rd Cir. 1989)). It noted, however, that it had previously held that "not all property interests worthy of procedural due process protection are protected by the concept of substantive due process." Ibid. (quoting Reich, supra, 883 F. 2d at 244). Although Reich had not defined the set of property interests protected by the concept of substantive due process, it had suggested that "only fundamental property interests are worthy of such protection." Reich, supra, 883 F. 2d at 244 (emphasis added). This suggestion was consistent with previous statements by this Court and other Circuits that the Constitution has been viewed as implicitly protecting only fundamental interests under substantive due process. See Reno v. Flores, __ U.S. ___, 113 S. Ct. 1439, 1447, 123 L. Ed. 2d 1 (1993); Regents of University of Michigan v. Ewing, 474 U.S. 214, 229 (1985) (Powell, J., concurring); Mid-American Waste Systems, Inc. v. Gary, 49 F. 3d 286, 290 (7th Cir. 1995); Mangels v. Pena, 789 F. 2d 836, 839 (10th Cir. 1986).

Having set out this promising framework, the Third Circuit then inexplicably set a new substantive due process standard for land use cases which is completely at odds with

the standards set by other Circuits and is indistinguishable from the standard used in state courts to review land use decisions. It reached this anomalous result in alleged reliance on two prior Third Circuit cases in which the plaintiffs were held to have stated substantive due process claims, Bello v. Walker, 840 F.2d 1124 (3rd Cir. 1988), and Niederhiser v. Borough of Berwick, 840 F. 2d 213 (3d Cir. 1988). In Bello, the plaintiff established an entitlement to a building permit in state court and then alleged a violation of his substantive due process rights because local officials had intentionally interfered with issuance of the permit for partisan political or personal reasons wholly unrelated to planning. In Niederhiser, the Third Circuit held that a lessor who had been denied a permit to conduct a video store business in a location which had been continuously occupied by commercial uses for thirty years stated a substantive due process claim because there was evidence that the local decisionmakers were offended by the adult movies the store proposed to rent, thus arguably violating the owner's first amendment rights. Like the plaintiff in Bello, the Niederhiser plaintiff had also established his entitlement to the permit at issue by bringing a successful appeal in state court.

The Third Circuit glossed over the obvious factual differences between these cases and DeBlasio and simply held that it was consistent with Bello to conclude that ownership was a property interest worthy of substantive due process protection. It then went on to interpret Neiderhiser as implying that since "a lessor possesses a property interest worthy of substantive due process protection against arbitrary and irrational governmental deprivation," therefore "an actual property owner, a fortiori, possesses such an interest." DeBlasio, supra, 53 F. 3d at 601, n. 10.

Someone who does not have an ownership, leasehold or some equivalent financial interest would be unlikely to challenge a land use decision, and virtually all challenges to

adverse land use decisions assert that the decision was arbitrary or irrational in some respect. Moreover, when state courts void local land use decisions, they frequently do so on the basis that the decision was arbitrary, capricious, or unreasonable. See Bressman v. Gash, 131 N.J. 517, 529, 621 A. 2d 476, 481 (1993). Thus, under the Third Circuit's "standard," District Courts will be forced to hear every land use complaint they receive, assuming the property owner is astute enough to claim that some aspect of the decision-making process was "arbitrary." This "standard" is likely to force into federal court a plethora of claims that are routinely successfully dealt with by state courts and to require local and state officials to defend a huge number of new lawsuits, even if any error in the decision-making process has already been corrected at the state level.

By the same token, the Third Circuit's "standard" is likely to force into federal court significantly increased numbers of challenges to federal agency actions as well. Like the actions of state and local administrative agencies, the actions of federal agencies may be set aside after judicial review if they are arbitrary, capricious, or unreasonable. Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983). Thus, under the Third Circuit's approach, a property owner aggrieved by a federal action could also bring a substantive due process claim as a substitute for judicial appellate review simply by alleging that the action was "arbitrary."

District Courts should not hear routine land use disputes that do not contain issues of constitutional significance. Nevertheless, the Third Circuit's standard is likely to transform those courts into zoning boards of appeal, Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974)(Marshall, J., dissenting), and thereby to place them in a completely inappropriate role which other Circuits have correctly decided should not be assumed. See Corn v.

Lauderdale Lakes, 997 F.2d 1369, 1389 (11th Cir. 1993); Yale Auto Parts, Inc. v. Johnson, 758 F. 2d 54 (2d Cir. 1985); RRI Realty Corp. v. Southampton, 870 F. 2d 911 (2d Cir. 1989), cert. denied 493 U.S. 893 (1989); Coniston Corp. v. Village of Hoffman Estates, 844 F. 2d 461, 465-66 (7th Cir. 1988).

State and local officials should be able to make land use decisions in good faith without the fear that they will be subject to a suit for damages under substantive due process if they do not render a decision that is completely favorable to the landowner. This Court thus should grant certiorari to prevent needless and disruptive federal oversight of local land use disputes.

B. The Approach to Substantive Due Process Taken by the Third Circuit Completely Disregards this Court's Jurisprudence.

As the Third Circuit correctly stated, this Court has never decided what specific property interest is required to mount a substantive due process claim alleging a deprivation of property. This lack of guidance stands in marked contrast to the Court's establishment of a property standard for procedural due process violations, Board of Regents v. Roth, 408 U.S. 564 (1972), and to its recent examination in Sandin v. Conner, ___ U.S. ___, 115 S.Ct. 2293 (1995), of the nature of liberty interests protected under the due process clause. Moreover, the lack of guidance in this area has become increasingly problematic in land use cases, as increasing numbers of landowners now routinely include substantive due process claims in challenges to adverse land use decisions, as well as procedural due process claims and takings claims.

In addition, the Third Circuit's decision is completely inconsistent with the approach taken by this Court in other substantive due process cases, including Sandin v. Conner, __ U.S. __, 115 S.Ct. 2293 (1995), Albright v. Oliver, __ U.S. __, 114 S. Ct. 807 (1994), and Paul v. Davis, 424 U.S. 693 (1975). In Sandin v. Conner, supra, for example, this Court held that a prisoner's punishment of discipline in segregated confinement did not present the type of atypical, significant deprivation creating a liberty interest, because the conditions of segregation mirrored the conditions to which the prisoner was already subject and the State later expunged his disciplinary record when it was determined that the discipline had been imposed improperly. The Court reached this result after focusing on the substantive nature of the deprivation, and after determining that the approach previously used under Hewitt v. Helms, 459 U.S. 460 (1983), was misguided because it had led to the involvement of federal courts in the day-to-day management of prisons and to a frequent squandering of judicial resources. This focus on the nature and quality of the deprivation had previously been followed in Paul v. Davis, supra, where this Court similarly determined that the liberty interests protected by the due process clause would not be construed so broadly as to transform the Fourteenth Amendment into a font of tort law to be superimposed on existing state tort systems.

Unlike the restrained approach used by this Court in Sandin and Paul, the approach used by the Third Circuit will transform the Fourteenth Amendment into a font of state and local land use law and needlessly involve the federal courts in day-to-day land use decisions that are better and more appropriately managed at the local level and by state courts. Moreover, the Third Circuit's approach will also require application of the nebulous standards of substantive due process in instances where the government conduct in the dispute is subject to the standards of explicit constitutional provisions, despite this

Court's holding in Albright v. Oliver, supra, that when the more explicit guarantees in the Bill of Rights provide protection against a particular sort of government behavior, claims should be analyzed under those guarantees and not under the "scarce and open-ended guideposts" of the substantive due process clause. Albright, supra, 114 S. Ct. at 812.[2] See also Nestor Colon Medina & Sucesores, Inc. v. Custodio, 964 F.2d 32, 46 (1st Cir. 1992).

In this case, DeBlasio essentially alleged a deprivation of procedural due process, by claiming that his request for a variance was not reviewed by an impartial tribunal. In addition, DeBlasio alleged a taking of his property for public use without just compensation. Both the District Court and the Third Circuit agreed that these claims were baseless and that state procedures were available to correct them in any event.

Consistent with Albright, the Third Circuit should have declined to apply the nebulous standards of substantive due process to DeBlasio's claims, and should instead have confined its analysis to the explicit applicable constitutional protections, namely the takings clause and procedural due process. The Third Circuit did not do so, however, but instead threw open the doors of the federal courts to virtually all land use disputes, no matter how trivial. Certiorari should be granted to correct this result.

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[2]In Albright, the plaintiff alleged that his arrest without probable cause violated his substantive due process rights. However, the Court held that plaintiff's rights respecting a pretrial deprivation of liberty stemmed from the Fourth Amendment and should be evaluated under that constitutional provision, not under substantive due process.

C. The Third Circuit Erred In Allowing a Property Owner to Mount a Substantive Due Process Challenge to a Land Use Decision Without Pursuing Available State Remedies.

In Williamson County Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985), this Court stated that a developer aggrieved by a local land use decision could not mount a substantive due process claim without first exhausting his administrative remedies, assuming that relief was available under substantive due process. Williamson, supra, 473 U.S. at 200. DeBlasio did not exhaust administrative remedies in this case, as he declined to timely object to the manner in which the ZBA proceedings were conducted or to timely pursue state remedies thereafter. Nevertheless, use of those procedures might well have rectified the procedural problem DeBlasio belatedly alleged occurred.

A property owner such as DeBlasio should not be allowed to ignore the remedies which are routinely used in local zoning disputes and to pursue the alternative route of a claim for damages under substantive due process. See Hartland Sportsman's Club v. Delafield, 35 F. 3d 1198, 1203 (7th Cir. 1994); Orange Lake Associates, Inc. v. Kirkpatrick, 21 F.3d 1214, 1224-25 (2d Cir. 1994). As this Court recognized in Parratt v. Taylor, 451 U.S. 527 (1981), if state law provides an adequate post-deprivation remedy for a deprivation of property caused by government officials, federal relief under 42 U.S.C. §1983 should not be available, particularly where it is claimed that the deprivation was caused by the failure to follow state procedures.

Here, the Third Circuit recognized the existence of both judicial review and a tort remedy under state law, but nevertheless reversed the dismissal of both DeBlasio's federal substantive due process claim and his state tort claims. This coupling of state tort law and federal substantive due process law will cause precisely the result this Court sought to avoid in Parratt: the transformation of any injury to property allegedly inflicted by a state actor into a federal due process claim, regardless of whether adequate state remedies exist or have been pursued. This approach clearly will encourage aggrieved landowners with adequate administrative and state remedies to deliberately by-pass those proceedings in favor of a federal substantive due process claim.

DeBlasio could have timely objected to the ZBA proceedings and could also have obtained judicial review in the state courts of the ZBA's decision. However, he failed to pursue those well established remedies and instead brought a federal substantive due process claim. Pursuant to Parratt, the Third Circuit should not have allowed this claim to proceed and thereby avoided unnecessary federal oversight, based on the existence of adequate state remedies. Cf. Nestor Colon, supra, 964 F.2d at 40; Licari v. Ferruzzi, 22 F.3d 344, 348 (1st Cir. 1994).

This Court's guidance is sorely needed to advise the Third Circuit and other Circuits of what property interests are protected under substantive due process, whether substantive due process may in fact be invoked in land use disputes subject to other explicit constitutional protections, and when, if ever, substantive due process may be used to superimpose federal land use law on existing state land use law. Accordingly, the petition for a writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

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Petitioners,

—v.—

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Respondent.

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MOTION BY THE NEW JERSEY STATE LEAGUE OF MUNICIPALITIES TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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The New Jersey State League of Municipalities ("the League") moves the Court for permission to file an *amicus curiae* brief in support of the petition for a writ of certiorari filed by the Zoning Board of Adjustment for the Township of West Amwell, the volunteer members of the Zoning Board, the Zoning Board's attorney and the Township's building inspector. Petitioners have consented to the League's filing an *amicus* brief in support of the petition. The League sought

consent from respondent but he declined. Leave to file is therefore sought pursuant to Rule 37.2 of this Court.

NATURE OF APPLICANT'S INTEREST

The League is an organization of over 560 New Jersey municipalities, organized to address legal, political and social issues of vital importance to New Jersey communities. The League's policy is to file *amicus* briefs when, and only when, important issues affecting New Jersey's municipalities are presented. In particular, it has appeared before the Supreme Court of New Jersey in numerous cases of prime importance to municipalities.[1] On several occasions, the Supreme Court of New Jersey *sua sponte* has asked the League to appear as *amicus curiae*.[2]

The League has taken an active interest in zoning and land use issues which, as this Court has recognized, is perhaps "the most essential function performed by local government."[3] Because of the importance of zoning issues to municipalities --and the frequency with which they arise --

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[1] *See, e.g., Morton International Inc. v. General Accident Ins. Co.*, 134 N.J. 1 (1993); *Rochinsky v. New Jersey Dep't of Transportation*, 110 N.J. 399 (1988).

[2] *See, e.g., New Jersey Transit Corp. v. Borough of Somerville*, 139 N.J. 582 (1995).

[3] *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting) ("I am in full agreement with the majority that zoning . . . may indeed be the most essential function performed by local government.").

the League has appeared as *amicus* in a variety of zoning cases before the Supreme Court of New Jersey and the Appellate Division of the Superior Court of New Jersey.[4]

The League's role in the use of the civil rights laws to resolve land use issues is of particular relevance to this case. The League appeared as *amicus* in the leading New Jersey state court decision on the use of 42 U.S.C. §1983 to resolve zoning disputes. *See Anastasio v. Planning Board of West Orange*, 209 N.J. Super. 499 (App. Div.), *cert. denied*, 107 N.J. 46 (1986). Most recently, it filed an *amicus* brief with the Supreme Court of New Jersey on a §1983 claim similar to that presented by the petition before this Court -- a local government official who voted against plaintiff on an application was allegedly biased and should have recused himself. *Rivkin v. Dover Township Rent Leveling Board*, 277 N.J. Super. 559 (App. Div. 1994).

The members of the League are seriously concerned about the increasing use of §1983 for local land use issues and the impact it has on their budgets and their ability to attract good

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[4] *See, e.g., The Great Atlantic & Pacific Tea Co. v. Borough of Point Pleasant*, 137 N.J. 136 (1994); *Urban v. Planning Board of the Borough of Manasquan*, 124 N.J. 651 (1991); *Kaufmann v. Planning Board for Warren Township*, 110 N.J. 551 (1988); *Committee for a Rickel Alternative v. City of Linden*, 214 N.J. Super. 631 (App. Div. 1987).

people to local government, particularly in the zoning area where officials, like petitioners here, often serve on a volunteer basis.

Respectfully submitted,

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No. 95-163

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

ZONING BOARD OF ADJUSTMENT FOR THE TOWNSHIP OF WEST AMWELL, HARRY K. RUSH, RAYMOND G. LINDBLAD, CHARLES A. BRITTON, GARY W. BLEACHER, DAVID L. DONDERO, STEWART PALILONIS, ROBERT FULPER, JR., WERNER J. HOFF, EUGENE J. VENETTONE, BARBARA GILL, JOSEPH HELEWA,

Petitioners.

v.

ALFRED DEBLASIO,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE NEW JERSEY STATE LEAGUE OF MUNICIPALITIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The New Jersey State League of Municipalities ("the League") respectfully submits this brief as *amicus curiae* in support of the petition for certiorari filed by the Zoning Board of Adjustment for the Township of West Amwell, the volunteer members of the Zoning Board, the Zoning Board's attorney and the Township's building inspector.

INTEREST OF AMICUS CURIAE

The applicant's interest is stated in the accompanying motion.

SUMMARY OF ARGUMENT

This case arises from a homeowner's complaint about the activities of a neighboring landowner and the landowner's resulting application for a zoning variance, which was denied by the local Zoning Board of Adjustment. Review of variance applications is the main function of local Zoning Boards in New Jersey and elsewhere and is the type of issue they confront on a regular and recurring basis. In New Jersey, a disappointed applicant has the right to seek review of the zoning Board's decision in the Superior Court of New Jersey, a right that the landowner here chose not to pursue. The question presented by this case is whether and when an unsuccessful applicant should also have the right to assert a substantive due process claim in addition to his state court remedy.

With increasing frequency disgruntled landowners and developers are turning to the substantive due process clause and 42 U.S.C. §1983 as the preferred method of litigating zoning disputes. The reasons are obvious and include:

- the ability to recover their attorney's fees under 42 U.S.C. §1988;

- the ability to seek damages against local officials in their individual capacity;

- the ability to embroil the municipality in protracted litigation through burdensome and time-consuming discovery;

- the ability to take the municipality out of the familiar setting of the local state court and into the less familiar and sometimes distant federal court;

- the ability to avoid the presumption of validity which attaches to local agency decisions in state court.[1]

By raising the stakes, civil rights claims are an excellent way to pressure a municipality in a zoning dispute and the lawyers who make a living representing disappointed applicants know it. Moreover, "[t]he possibility of facing expensive and aggravating litigation as a result of making a decision on an application for development may in a subtle way impact on the decision making process." *Anastasio v. Planning Board of Township of West Orange*, 209 N.J. Super. 499, 526 (App. Div.), *cert. denied*, 107 N.J. 46 (1986).

The increasing use of the substantive due process clause for zoning disputes is best demonstrated by the growing number of reported and conflicting decisions from the Circuits attempting to apply the clause in this context. Guidance from this Court is desperately needed to bring order to the confusion created by the conflicting Circuit and state

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[1] *Kramer v. Board of Adjustment, Sea Girt*, 45 N.J. 268, 296 (1965).

court positions. In particular, this Court should clarify the following issues for the Circuits and the local municipalities and local officials who may be subject to damage and attorney's fee claims for any misstep in this area.

First, this Court's recent opinion in *Albright v. Oliver*, 114 S. Ct. 807 (1994), suggests that the generalized notion of substantive due process should not be used to resolve land use disputes in light of the explicit protection for excessive land use regulation in the takings clause of the Fifth Amendment. *Albright* was decided after the parties briefed the case below in the Third Circuit and is not cited in the Third Circuit's decision.

Second, if there is a substantive due process claim for zoning disputes, then it should be conditioned on having a "fundamental right" at stake. The law in the Circuits on this particular issue is in chaos and uniformity is needed on this critical issue.

Finally, if there is a substantive due process claim for zoning disputes, and if such a claim does *not* require a "fundamental right" to be at stake, then it should be conditioned on the state remedy being inadequate. Here again, there is confusion in the circuits. There also is a dramatic conflict between the Third Circuit and the New Jersey state courts on this aspect of §1983 with the end result being that zoning plaintiffs have a much greater incentive to file their substantive due process claim in federal court rather than state court, where zoning claims have historically been resolved. This reversal of roles is inimical to the concept of federalism and this Court should resolve the conflict causing it.

POINT I

GENERALIZED NOTIONS OF SUBSTANTIVE DUE PROCESS SHOULD NOT BE USED FOR LAND USE DISPUTES

In 1992, the Sixth Circuit made a herculean effort to summarize the conflicting positions of the Circuits on the use of the substantive due process clause for zoning cases. *See Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1215-18 (6th Cir. 1992). Since then, as petitioners point out, the disharmony has increased. *See* Petition at 13-14.

Lurking in this morass is a larger question -- whether the substantive due process clause should ever be used for land use disputes. "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992).

This Court's recent decision in *Albright v. Oliver*, 114 S. Ct. 807 (1994), suggests that larger question has to be answered and provides even more reason for the Court to take this case and end the confusion.[2] *Albright* is the latest decision to hold that the substantive due process clause should

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[2] Although the Third Circuit's decision in *Deblasio* was decided some 16 months after *Albright*, the Third Circuit never cited it, no doubt because *Deblasio* was briefed before *Albright* was decided. In short, it does not appear that the Third Circuit was aware of *Albright* when it decided *Deblasio*.

not be used to analyze claims that are covered by another, specific provision in the Constitution. The plaintiff in *Albright* asserted a substantive due process claim for being subjected to criminal charges without probable cause. Seven members of the Court agreed that the substantive due process claim should be dismissed as a matter of law. Chief Justice Rehnquist's plurality opinion (joined in by Justices O'Connor, Scalia and Ginsberg) found the existence of the Fourth Amendment's more specific provisions fatal to assertion of a generalized substantive due process claim:

> It was through [the] provisions of the Bill of Rights that [the] Framers sought to restrict the exercise of arbitrary authority by the Government in particular situations. Where a particular amendment "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."

Id. at 813 (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

Justice Kennedy, joined by Justice Thomas, agreed "with the plurality that an allegation of arrest without probable cause must be analyzed under the Fourth Amendment without reference to more general considerations of due process." *Id.* at 817 (Kennedy, J. concurring). Justice Souter likewise noted the Court's tradition of "reserving due process for otherwise homeless substantial claims." *Id.* at 820 (Souter, J., concurring).

With respect to zoning, the Bill of Rights contains a specific provision for arbitrary and irrational land use decisions by municipalities. The takings clause of the Fifth Amendment provides in pertinent part:

> nor shall private property be taken for public use, without just compensation.[3]

In the words of *Albright*, because the takings clause "provides an explicit textual source of constitutional protection" from overzealous or misguided zoning officials, that clause, and "not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."

In recent years, this Court has not hesitated to use the takings clause to invalidate arbitrary action by local officials with respect to zoning issues. *See Dolan v. City of Tigard, 114 S. Ct. 2309 (1994)* (City Planning Commission conditioned approval of landowner's application to expand her store and pave her parking lot upon the landowner dedicating a public greenway and a pedestrian/bicycle pathway); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (Coastal Commission conditioned approval of homeowners' rebuilding permit upon homeowners allowing the public an easement to pass across their beach); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (clause extends to temporary takings).

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[3] The takings clause has been made applicable to the States through the Fourteenth Amendment. *See Chicago B & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

To be sure, some local actions are not severe enough to constitute a taking but yet still burden a property owner. Those local actions, however, should not be subject to a substantive due process challenge where, as here, New Jersey provides a "safety valve" in the form of the variance application process by which the property owner can seek relief from that burden from the local agency and appeal any adverse decision to the Superior Court. *See* Rohan, 6 Zoning and Land Use Controls, §43.01[3] (1995).

This conclusion is bolstered by local government's historical and primary role in land use regulation. Justice Marshall was no doubt correct when he stated:

> I am in full agreement with the majority that zoning . . . may indeed be the most essential function performed by local government.

Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting). *Accord, FERC v. Mississippi, 456 U.S. 742, 768 n.30 (1982)* ("regulation of land use is perhaps the quintessential state activity"). Local government's special and unique role in the zoning field counsels against the use of a substantive due process cause of action as a supplement to the remedies provided by the takings clause and state law. *See Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225-26 (1985) (noting "the prerogatives of state and local educational institutions" and stating "Considerations of profound importance counsel restrained judicial review of the substance of academic decisions.")

POINT II

ALBRIGHT PROVIDES ADDITIONAL REASON FOR REVIEWING THE PROPERTY INTEREST QUESTION

If a substantive due process claim exists for zoning disputes, the next issue is the nature of the property or other interest required in order to assert such a claim. As petitioners aptly point out, the Circuits are hopelessly splintered as to the nature of the interest required for a substantive due process claim in the zoning area. In 1995 alone, three Circuits have taken three different approaches to the issue.[4]

Here again, this Court's decision in *Albright* suggests a solution and supports a decision to take this case and bring some much needed harmony to this important area of constitutional law. Chief Justice Rehnquist's plurality opinion (joined by O'Connor, Scalia and Ginsberg) indicates that unlike a procedural due process claim, a substantive due process claim lies only where a "fundamental right" is at stake:

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[4] *Compare Deblasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592 (3d Cir. 1995) (applying "mere ownership" test) *with Mid-American Waste Systems, Inc. v. City of Gary*, 49 F.3d 286 (7th Cir. 1995) (applying "fundamental rights" test) *and Triomphe Investors v. City of Northwood*, 49 F.3d 198 (6th Cir. 1995) (applying "legitimate entitlement" test).

> The protection of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity.

114 S. Ct. at 812. *See, e.g., Planned Parenthood of Southeastern, Pa. v. Casey*, 112 S. Ct. 2791 (1992) (describing cases in which substantive due process rights have been recognized); *Regents of University of Michigan*, 474 U.S. at 228-29 (Powell, J. concurring) (While property interests for procedural due process purposes are created by state law, "substantive due process rights are created only by the Constitution.")

The "mere ownership" test adapted by the Third Circuit in this case can not be reconciled with this Court's recent writings on the substantive due process clause. Moreover, petitioners are clearly correct when they argue that the "mere ownership" standard is really no standard at all. *See* Petition at 14-15. In essence, it permits any landowner to transform any routine zoning dispute into a substantive due process claim, thereby placing it on the same plane as fundamental rights relating to marriage, family, procreation, and bodily integrity. This dramatic expansion of substantive due process needs to be addressed by this Court.

POINT III

THERE IS A SPLIT IN THE LOWER COURTS OVER THE IMPACT OF AN ADEQUATE STATE REMEDY ON A SUBSTANTIVE DUE PROCESS CLAIM

A. Justice Kennedy's and Thomas' Concurring Opinion in *Albright*

If a substantive due process claim exists for zoning disputes, and if such a claim is not limited by the "fundamental rights" test advocated above, then it should be available only if state law does not provide an adequate remedy. The adequacy of state remedies is a relevant factor in reviewing constitutional claims under both the takings clause, *see Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 196-97 (1985), and the due process clause. *See Parratt v. Taylor*, 451 U.S. 527, 535-44 (1981); *Hudson v. Palmer*, 468 U.S. 517, 531-36 (1984).

Justice Kennedy's and Thomas' concurring opinion in *Albright* support the proposition that the *Parratt* doctrine should apply to substantive due process claims for zoning issues if such claims can be asserted when "fundamental rights" are not at stake.

> The commonsense teaching of *Parratt* is that some questions of *property*, contract, and tort law are best resolved by state legal systems without resort to the federal courts, even when a state actor is the alleged wrongdoer. . . . The *Parratt* principle respects the delicate balance between state and federal courts and comports with the design of §1983, a statute

> that reinforces a legal tradition in which protection for persons and their rights is afforded by the common law and the laws of the States, as well as by the Constitution.

114 S. Ct. at 818-19 (emphasis added).

Moreover, Justices Kennedy and Thomas correctly pointed out that the "*Parratt* rule has been avoided by attaching a substantive rather than procedural label to due process claims (a distinction that if accepted in this context could render *Parratt* a dead letter)." *Id.* at 819. The instant case is an excellent example of that very problem. The essence of plaintiff's claim is that a local official was biased and should have recused himself. The right to an impartial decisionmaker has traditionally been considered a component of "procedural" due process. *See Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

In this case, however, plaintiff styled his claim as both a procedural and a substantive due process violation. The Third Circuit dismissed the procedural due process claim because New Jersey zoning law provided an adequate remedy for this violation. But when it considered the same claim under a substantive due process label, the adequacy of the state remedy played no role in the analysis.

This result makes no sense. If the state provides an adequate remedy for a procedural due process violation arising from a biased decisionmaker, then surely that remedy is just as adequate if the same claim is called a substantive due process violation. The *Parratt* doctrine should apply to both procedural and substantive due process claims, unless a

fundamental right is at stake. *But see Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (5-4 decision).

B. The Split In The Circuits

Unlike the Third Circuit, where the *Parratt* doctrine seems to have no bearing on a substantive due process zoning claim, a post-*Zinermon* decision from the Seventh Circuit continues to require the developer to demonstrate the inadequacy of state remedies before pursuing a substantive due process claim. *See New Burnham Praire Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1479 (7th Cir. 1990). A post-*Zinermon* decision from the Sixth Circuit also has relied on the adequacy of state remedies to dismiss a substantive due process claim where a fundamental right was not at stake. *See United of Omaha Life Ins. Co. v. Solomon*, 960 F.2d 31, 35 (6th Cir. 1992). *See also McKinney v. Pate*, 985 F.2d 1502, 1507-15 (11th Cir.) (Tjoflat, C.J., concurring) (noting the problems in this area when substantive due process is not limited to fundamental rights), *vacated*, 994 F.2d 772 (11th Cir. 1993) (en banc), *superseded by*, 20 F.3d 1550, 1556-57 (11th Cir. 1994) (en banc) (substantive due process applies only to fundamental rights; therefore adequacy of state remedies is irrelevant).

C. The Split Between The Third Circuit And The New Jersey State Courts

Even more significant, at least for purposes of federalism, is the split on this issue between the Third Circuit and the New Jersey state courts. In the Third Circuit

> a land-owning plaintiff states a substantive due process claim where he or she alleges that the

> decision limiting the intended land use was arbitrarily or irrationally reached. Where the plaintiff so alleges, the plaintiff has, as a matter of law, impliedly established possession of a property interest worthy of substantive due process protection.

Deblasio, 53 F.3d at 601.[5] And as *Deblasio* and earlier Third Circuit cases demonstrate, those substantive due process claims often survive summary judgment motions because of issues of fact.[6]

Unlike the Third Circuit, where the adequacy of a state remedy for an arbitrary zoning decision seems to be

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[5] *Accord, Bensalem Road Corp. v. Bensalem Township*, 57 F.3d 253 (3d Cir. 1995) (developer who had been denied building permits stated a substantive due process claim by alleging that officials did so for reasons unrelated to the merits); *Neiderhiser v. Borough of Berwick*, 840 F.2d 213 (3d Cir.), *cert. denied*, 488 U.S. 822 (1988) (lessor who had been denied an exemption from a zoning ordinance stated a substantive due process claim by alleging that the exemption was arbitrarily and irrationally denied); *Bello v. Walker*, 840 F.2d 1124 (3d Cir.), *cert. denied*, 488 U.S. 868 (1988) (developer who had been denied a building permit application stated a substantive due process claim by alleging arbitrary abuse of power by municipal official).

[6] *See, e.g., Bensalem*, 57 F.3d 253 (reversing dismissal and ordering a third trial); *Neiderhiser*, 840 F.2d 213 (denying summary judgment motion on substantive due process claim); *Bello*, 840 F.2d 1124 (same).

irrelevant, that is the critical factor for the New Jersey state courts when they apply §1983 to zoning claims. This is perhaps explained by the state court's familiarity with, and confidence in, the New Jersey state law remedy for correcting zoning mistakes by local officials. A brief discussion of that remedy is therefore in order.

In New Jersey, the actions of municipal agencies and officials are subject to review in the Superior Court, in an action in lieu of prerogative writs.[7] *See generally Alexander's v. Borough of Paramus*, 125 N.J. 100, 107-08 (1991). The trial court's review of the municipal action is based on the record below, and the agency's determination is set aside if it is arbitrary, capricious or unreasonable, not supported in the evidence, or otherwise contrary to law. *See, e.g., Rivkin v. Dover Township Rent Leveling Board*, 277 N.J. Super. 559, 569 (App. Div. 1994).

Prerogative writ actions are available to protect "an aggrieved citizen from almost every form of improper official action." *Ward v. Keenan*, 3 N.J. 298, 308 (1949). The Supreme Court of New Jersey has described the prerogative court action as a "safeguard of liberty" and "one of the best of all the securities for the maintenance of the supremacy of the law." *Id.* (quoting Holdsworth, 10 History of English Law 517).

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[7] The prerogative writs are *certiorari, quo warranto, prohibition* and *mandamus*. They were superseded by the New Jersey Constitution in 1947 which provided for "review, hearing and relief" in the Superior Court in lieu of the superseded writs. N.J. Const. art. VI §5, ¶4.

In contrast to federal civil rights litigation, the prerogative writ action was designed for deliberate speed. In fact, the current system for prerogative writ actions was created by the New Jersey Constitution of 1947, in part because of dissatisfaction over the delays inherent in the former system. *See Ward*, 3 N.J. at 304-05. The drafters of the 1947 Constitution recognized that "[t]hese cases are required to be decided promptly as befits the transaction of important public business." *Id.* at 305.

Thus, while a plaintiff has a two year statute of limitations in the Third Circuit for bringing a §1983 claim, *Genty v. RTC* 937 F.2d 899, 919 (3d Cir. 1991), a prerogative writ claim generally must be brought within 45 days of the adverse municipal action. New Jersey Court Rule 4:69-6(a). While a civil rights plaintiff can take full advantage of the discovery available under the federal rules, the general rule in prerogative writ actions is that there is no discovery and the trial court is limited to the record developed by the parties before the municipal agency. *Kramer v. Board of Adjustment, Sea Girt*, 45 N.J. 268 (1965).

As the Appellate Division recently recognized, the prerogative writ action is, in certain respects, *more* effective than a money damage claim under §1983 for correcting due process violations:

> The review of agency determinations afforded in actions in lieu of prerogative writs is a more effective postdeprivation remedy than the postdeprivation tort claims that ware available to the plaintiffs in *Parratt* and *Hudson*. . . . The tort remedy is indirect; it redresses the violation of a plaintiff's rights with a payment

> of money. The action in lieu of prerogative writs provides a direct remedy; it substantially restores the status quo by overturning the agency ruling that was the fruit of the due process deprivation.

Rivkin, 277 N.J. Super. at 569-70.[8]

Given the powerful and speedy nature of this remedy, it is not surprising that the New Jersey state courts have deemed it to be an adequate remedy for zoning and other local agency abuses, thereby obviating the need for a due process claim. The leading decision is *Anastasio v. Planning Board of Township of West Orange*, 209 N.J. Super. 499, 521 (App. Div.), *cert. denied*, 107 N.J. 46 (1986), where a developer filed a §1983 damage claim against various municipal officials because they had denied the developer's request for site plan approval. The trial court found that the municipal officials "were acting with malicious intent which resulted in depriving plaintiffs of their rights," *id.* at 515, and a compensatory and punitive damage award was entered.

The Appellate Division reversed the finding of §1983 liability because the prerogative writ action provided an adequate remedy:

> New Jersey law granted the victim of such a mistaken action a complete remedy, so there

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[8] To the extent damages are relevant, the New Jersey Tort Claims Act provides a damage remedy against municipalities and local officials subject to the immunity provisions of that Act. *See* N.J.S.A. 59:1-1 et seq.

> was no deprivation of any interest, only a delay.

Id. at 522 (citing *Parratt*). Subsequent New Jersey decisions have consistently rejected §1983 claims for arbitrary and capricious action by municipal officials because review of that action was available in a prerogative writ action.[9] As the Appellate Division stated:

> If we were to hold a municipal agency liable under 42 U.S.C. §1983 merely for mistakenly exercising power under state law remediable under state law, public entities on all levels would face a myriad of potential claims and would serve at great financial peril. . . . We do not believe that Congress intended such broad liability for ordinary governmental decisions.

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[9] *See Bernardsville Quarry, Inc. v. Bernardsville Borough*, 129 N.J. 221, 246-47 (1992) (affirming Appellate Division's denial of §1983 claim for arbitrary and capricious denial of license under a quarry ordinance because "the availability of review of that action in the Superior Court prevented such alleged violation from being actionable under [§1983]."); *Rivkin*, 277 N.J. Super. at 569-70 (prerogative writ action provides adequate post-deprivation remedy for a claim that member of rent leveling board had a conflict of interest); *Silverman v. Rent Leveling Board of Cliffside Park*, 277 N.J. Super. 524, 537-38 (App. Div. 1994) (prerogative writ action provides adequate post-deprivation remedy for a claim that Mayor and Council arbitrarily denied application for a rent hardship increase).

Silverman v. Rent Leveling Board of Cliffside Park, 277 N.J. Super. 524, 538 (App. Div. 1994).

In sum, the contrast between the Third Circuit law and the New Jersey state court law is dangerously dramatic. We say "dangerously" because it invites zoning plaintiffs to file zoning cases in federal court rather than state court where they have historically been resolved. This Court should resolve this conflict --as well as the conflict among the Circuits -- and bring some much-needed uniformity to this area of the law that is of the utmost importance to local government.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: September 26, 1995

Respectfully submitted,

/s/ Fred G. Stickel, III

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ZONING BOARD OF ADJUSTMENT FOR THE TOWNSHIP OF WEST AMWELL; HARRY K. RUSH; RAYMOND G. LINDBLAD; CHARLES A. BRITTON; GARY W. BLEACHER; DAVID L. DONDERO; STEWART PALILONIS; ROBERT FULPER, JR.; WERNER J. HOFF; EUGENE J. VENETTONE; BARBARA GILL; JOSEPH HELEWA,

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OCTOBER TERM, 1995

No. 95-163

ZONING BOARD OF ADJUSTMENT FOR THE TOWNSHIP OF WEST AMWELL; HARRY K. RUSH; RAYMOND G. LINDBLAD; CHARLES A. BRITTON; GARY W. BLEACHER; DAVID L. DONDERO; STEWART PALILONIS; ROBERT FULPER, JR.; WERNER J. HOFF; EUGENE J. VENETTONE; BARBARA GILL; JOSEPH HELEWA,

Petitioners,

v.

ALFRED DEBLASIO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONERS' REPLY BRIEF

INTRODUCTION

Respondent DeBlasio's Brief in Opposition to Petition for Writ of Certiorari ("Brief in Opposition") fails to address any of the following reasons offered by Petitioners and the *Amici Curiae* favoring the grant of review by this Court:

- the mature and multi-faceted split among the Courts of Appeals, generally, and this singular and dangerous decision by the Court of Appeals for the Third Circuit, specifically (*See e.g.*, Petition for a Writ of Certiorari ("Petition") at 9-14);

- the equally remarkable split between the Third Circuit and the state courts of New Jersey (*See e.g.*, Brief of the New Jersey State League of Municipalities as *Amicus Curiae* in Support of Petitioners (the "League's Brief") at 13-19);
- the striking inconsistency between the Third Circuit's wildly expansive approach and the evolving restraint of this Court's substantive due process jurisprudence (*See e.g.*, Petition at 15-17; League's Brief at 5-13; Brief of the States of New Jersey, et al. As *Amici Curiae* in Support of Petitioners (the "Attorney Generals' Brief") at 9-13);
- the lack of authoritative guidance provided by this Court (*See e.g.*, Majority below at 11a, 17a, n.9); and,
- the threat to federalism and volunteerism posed by both the uncertainty in the current law and the reality of operating under the Third Circuit's new test (*See e.g.*, Petition at 18-22; League's Motion at 2-4; League's Brief at 2-4, 13-19; Attorney Generals' Brief at 1-3).

Instead, DeBlasio responds with 12 pages of factual meanderings and a single argument premised on an incorrect reading of one case from another Circuit. At this procedural stage, little—if any—of what Respondent argues is relevant to the Court's determination of whether or not to grant review. Moreover, even the most cursory analysis of the Brief in Opposition reveals that the Respondent utterly misapprehends the controlling law and grossly misstates the pertinent facts.

ARGUMENT

Respondent asks this Court to conclude that "no controversy" is presented by this case. This is the only basis for Repondent's opposition to the Petition, and may be summarized as follows: Because Respondent would prevail under either the Third Circuit's "mere ownership"

standard or the more common "legitimate entitlement" test—where "but for" the alleged bias of one or more of the ZBA defendants he would have had a "strong likelihood" of having his variance application granted because it was "an undisputed proven fact below" that his proposed use of the land was "less intense" than that conducted by prior owners, thereby "entitling" him as a matter of law to have his variance granted and thereby divesting the ZBA defendants of all "discretion" to reach any other conclusion—there is nothing here for this Court to decide. *See* Brief in Opposition at 15-20.

This "house of cards" argument is constructed on two demonstrably incorrect propositions: 1) it is the evidentiary record created before the local board on the discrete application in issue to which federal courts must look to determine whether the applicant has a legitimate claim of entitlement; and, 2) the evidentiary record created before the ZBA admits of only one reasonable determination, *i.e.* the grant of the variance. As will be shown below, both of Respondent's premises are false.

I. IN DETERMINING WHETHER OR NOT AN APPLICANT HAS A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST, COURTS OF APPEALS OTHER THAN THE THIRD CIRCUIT HAVE CONSISTENTLY LOOKED TO STATE LAW—NOT TO THE EVIDENTIARY RECORD OR THE ACTIONS OF INDIVIDUAL ZONING BOARD MEMBERS—IN ORDER TO DETERMINE WHETHER A LOCAL ZONING AGENCY HAS DISCRETION TO DENY THE VARIANCE OR OTHER BENEFIT SOUGHT.

Respondent's legal argument—that he had an entitlement to a variance because the ZBA defendants had no discretion to deny his application as a result of the record facts demonstrating a "strong likelihood" that he would have received a variance "but for" their actions—is based entirely on a misreading of the Second Circuit's decision in *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54 (2d Cir. 1985). Respondent takes a snippet of language out

of context from *Yale Auto Parts* and fails to note that as recently as February of this year the Second Circuit has expressly rejected his exact argument:

> The 'strong likelihood' aspect of *Yale Auto Parts* comes into play only when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured; an entitlement does not arise simply because it is likely that broad discretion will be favorably exercised. *Since the entitlement analysis focuses on the degree of official discretion and not on the probability of its favorable exercise, the question of whether an applicant has a property interest will normally be a matter of law for the court.*

RRI Realty Corp. v. Inc. Village of Southampton, 870 F.2d 911, 918 (2d Cir. 1989) (emphasis added); *Accord Zahra v. Town of Southold*, 48 F.3d 674, 680 (2d Cir. 1995).

Thus, the Second Circuit looks solely to state law to determine the discretion of a local zoning board and will make such determinations (e.g. "strong likelihood") only when state law provides no discretion to the ZBA.

Courts of Appeals in other Circuits applying the "legitimate claim of entitlement" standard have also refused to base their findings of discretion, or lack thereof, on a factual review of the evidentiary record or on the actions of individual board members in a given case. Instead, these courts have also looked solely to state and municipal law in determining the amount of discretion afforded a local regulatory body. *Biser v. Town of Bel Air*, 991 F.2d 100, 104 (4th Cir. 1993), *cert. denied*, 114 S.Ct. 182 (1993) ("In applying this standard of entitlement, we have held that if a local agency has 'any significant discretion' in determining whether a permit should issue, then a claimant has no legitimate claim of entitlement and, hence, no cognizable property interest. The fact that Biser believes that the Board acted arbitrarily does noth-

ing to change the fact that he was not deprived of any entitlement or right."); *Silver v. Franklin Tp. Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992) ("We conclude that the Zoning Resolution as a whole gives the Board discretion to issue a conditional zoning certificate even if the property owner can demonstrate that the use is conditionally permitted under the Zoning Resolution. Because the Board has such broad discretion, Silver possessed neither a legitimate claim of entitlement to the zoning certificate nor a justifiable expectation that the Board would issue the certificate."); *Spence v. Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989) (holding that constitutionally protected property interest is found only if "the municipality lacks discretion and must issue a building permit to an applicant who complies with the statutory requirements *and* the applicant has fulfilled the requirements.") (emphasis in original).

Under New Jersey law, the discretion given the ZBA is clear. New Jersey zoning law authorizes a zoning board of adjustment to grant a variance in "particular" cases and for "special reasons". N.J. Stat. Ann. § 40:55D-70(d). Moreover, the New Jersey courts have recognized that the legislature has vested discretionary authority in boards of adjustment to grant or deny variance applications. *Bressman v. Gash*, 621 A.2d 476 (N.J. 1993). *See also Eagle Group v. Zoning Bd. of Adjustment*, 644 A.2d 1115, 1120 (N.J. Super. Ct. App. Div. 1994).

Therefore, under the legitimate claim of entitlement standard, properly understood, Respondent had no property interest in the variance which could support a substantive due process claim. Put simply, New Jersey state law permitted the ZBA defendants to make the decision they made, and the federal courts are not in the business of re-analyzing the record evidence supporting that decision. The type of record sifting that Respondent is asking the United States Supreme Court to now perform is the proper domain of the New Jersey state courts. *See e.g.*,

League's Brief at 14-17; Attorney Generals' Brief at 12-13.[1]

II. EVEN ASSUMING THAT THIS COURT CHOSE TO APPLY THE LEGAL STANDARDS CREATED BY RESPONDENT, THE RECORD EVIDENCE STILL SUPPORTS THE CONCLUSION THAT THE ZBA DEFENDANTS HAD THE DISCRETION TO DENY THE VARIANCE.

Notwithstanding the above, Petitioners feel compelled to address briefly Respondent's factual argument because it contains numerous incorrect assertions regarding settled New Jersey zoning law and the record created before the Zoning Board.

First, Respondent would have had no right under New Jersey law to have placed *any* nonconforming use on his property merely because it was no more "intense" than

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[1] Apparently as a fall-back position, Deblasio argues that the legitimate claim of entitlement standard is fundamentally unfair because it "shackles a landowner with the added burden" of "proving entitlement to a variance, permit or license" when "persons who are denied occupational licenses need only show that their license application was arbitrarily denied to state a claim." Brief in Opposition at 24; *See also* **Majority, 18a, n.11.**

However, Respondent's analogy also fails. Courts have applied the same standard to both applicants seeking occupational licenses and applicants seeking variances in land. For instance, in *Neuwirth v. Louisiana State Bd. of Dentistry*, 845 F.2d 553 (5th Cir. 1988), an out-of-state dentist sued the Louisiana State Board of Dentistry for "arbitrarily" denying his application for a reciprocal license. *Id.* at 555. In holding that the dentist had no constitutionally protected interest in a reciprocal license without an examination, the court found dispositive a Louisiana statute which provided that the Board "may issue a license without exam" on reciprocal terms. *Id.* at 557.

Further, the only case cited by Respondent and the Majority in support of this analogy to the occupational licensing context held that the state's denial of a barbershop license unconstitutionally deprived the applicant of his "liberty" interest in pursuing his occupation, but expressly did not reach the "property" interest issue. *Wilkerson v. Johnson*, 699 F.2d 325, 328 (6th Cir. 1983).

his once valid, preexisting nonconforming use of a one-man auto repair business. Rather, as correctly recognized by the Dissent, under settled New Jersey law:

> an existing nonconforming use may not be enlarged or changed as of right and will be allowed to persist only 'if it is a continuance of substantially the same kind of use as that to which the premises were devoted at the time of the passage of the zoning ordinance.' *Id.* Furthermore, '[w]here there is doubt as to the substantiality of the extension, it should be disapproved.' *Hartman v. Township of Randolph*, 155 A.2d 554, 558 (N.J. Super. Ct. App. Div. 1959).

(28a).

Here, Respondent illegally and deliberately changed the use (as well as the intensity of the use) without a use variance. *See Barbarisi v. City of Paterson Bd. of Adjustment*, 103 A.2d 164 (N.J. Super. Ct. App. Div. 1954). Indeed, Respondent illegally changed the use shortly after a use variance to allow a drywall storage business on his property had been denied and shortly after the then Township Building Inspector had advised Respondent of the limited nature of his nonconforming use. As a matter of law, Respondent abandoned his valid nonconforming use and was required either to conform the use on his property to the current zoning or obtain a use variance.[2] *Id.* at 167-168.

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[2] Respondent seems to suggest (Brief in Opposition at 6) that because he had been successful in maintaining his illegal use for a number of years, estoppel should have been applied. However, under settled New Jersy law, a zoning board lacks jurisdiction to decide equitable issues and can only act within its statutory framework. *Branagan v. Schettino*, 242 A.2d 853, 858 (N.J. Super. Ct. App. Div. 1968). Only the New Jersey courts can decide such equitable issues. *Id.* Of course, Respondent chose not to pursue his state court remedies. Moreover, there was no "campaign" to oust Interstate Battery. Rather, Interstate's illegal operation in a residential zone had grown from a very small one to a large one (4a). Understandably, the Lavans were upset with this growing

Moreover, because Respondent had as a matter of law abandoned the nonconforming use, the issue before the Zoning Board was not, as Respondent believed, whether the battery storage and distribution business as operated by Interstate was more or less intense than a one-man auto repair business. Rather, the issue was whether Interstate's operation met the subjective criteria established under the New Jersey Municipal Land Use Law for *establishing* a commercial use in a residential zone. *N.J. Stat. Ann.* § 40:55D-70. *See e.g., Medical Realty Associates v. City of Summit Bd. of Adjustment*, 549 A.2d 469, 473-474 (N.J. Super. Ct. App. Div. 1988); *Dissent* (29a).

Among other things, the evidentiary record created before the Zoning Board clearly demonstrates that the amount of traffic, type of traffic and hours of operation of Interstate were far beyond the character contemplated in the residential zone and that, therefore, Respondent had failed to prove that "the variance can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance." *N.J. Stat. Ann.* § 40:55D-70. Thus, even under Respondent's incorrect application of the "legitimate claim of entitlement" test, the record before the Zoning Board did not admit of only one reasonable conclusion. Accordingly, even under Re-

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intrusion next door and demanded that West Amwell enforce its zoning ordinances. The Lavans had as much right to request municipal agencies to take action to prevent an illegal use of an adjoining property as did the Respondent to request a variance to allow an otherwise illegal use on that property. *See e.g., Katz v. Morgenthau*, 709 F.Supp. 1219, 1231 *aff'd in part, rev'd in part*, 892 F.2d 20 (2d Cir. 1989) (*citing, Powell v. Workmen's Compensation Bd. of the State of New York*, 327 F.2d 131, 137 (2d Cir. 1964) (no merit to plaintiff's conspiracy allegations where the facts indicated no more than the actions of several interested parties who vigorously sought to protect their own interests.)

spondent's misplaced argument, the Zoning Board had "discretion" to deny the variance.[3]

In sum, this case presents a live controversy warranting this Court's attention. As demonstrated above and in the Petition, whether or not Respondent's substantive due process is viable (and, thus, whether or not Respondent and others like him will receive a federal court jury trial on such claims) will be determined, at least as a threshold matter, by which test the reviewing court chooses to apply. Under current law, the viability of a substantive due process claim such as DeBlasio's may be judged by any one of at least three disparate tests (*i.e.*, "mere ownership," "legitimate claim of entitlement" and "fundamental rights") depending upon the happenstance of geographic location. Lack of uniformity of this magnitude is highly corrosive to the cornerstone of our theoretically unified system of federal courts: The consistent adjudication of disputes among similarly situated citizens, regardless of forum. It is difficult to imagine that another petition could present these issues any more starkly and simply to this Court.

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[3] In New Jersey, a zoning board, like any court or jury, may accept or reject expert testimony. *Hawrylo v. Harding Tp. Board of Adjustment*, 592 A.2d 1236, 1241 (N.J. Super. Ct. App. Div. 1991). Here, the Zoning Board acted quite properly in rejecting patently incredible testimony from Respondent's expert to the effect that Interstate's use, which included six full-time and two to three part-time employees, utilizing four tractor trailer trucks which idled outside of the building and operated from Monday through Saturday beginning at 6:30 a.m., was less intense than a one-man, indoor, automobile repair shop which operated from 8:00 a.m. to 6:00 p.m., Monday through Friday.

CONCLUSION

Respondent has presented nothing in his Opposition which refutes or diminishes the substantial and compelling reasons for the granting of the Petition asserted by Petitioners and strongly endorsed by *Amici Curiae* Attorneys General and prospective *Amicus Curiae* New Jersey League of Municipalities. Therefore, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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